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No. 92-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AZUL PACIFICO, INC.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Los Angeles' mobile home rent control ordinance, on its face or as applied here, effect a regulatory taking of petitioner's property requiring the payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Do property owners have a direct claim for just compensation under the Fifth and Fourteenth Amendments or must they seek relief pursuant to the remedy enacted by Congress in 42 U.S.C. § 1983?

3. What statute of limitations, if any, applies to claims for constitutional just compensation asserted in the federal courts?

4. When does a regulatory takings claim accrue for statute of limitations purposes?

LIST OF PARTIES

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of the Rules of this Court, petitioner is a privately held corporation that has no parent corporation or non-wholly owned subsidiaries.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Azul Pacifico, Inc. ("Azul") hereby petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

California and Los Angeles laws combine to impose strict rent and occupancy controls on the owners of mobile home parks. These restrictions result in the transfer from property owner to tenant of a substantial portion of the right to occupy the property and constitute a regulatory taking under the Fifth Amendment to the Constitution.

Petitioner's federal claim for just compensation under the Takings Clause was dismissed by the court below on the ground that there is no direct constitutional cause of action for Takings Clause compensation and that, in any

event, any such action for such compensation under the Constitution or 42 U.S.C. § 1983 is barred by California's one-year personal injury statute of limitations because it was not commenced within one year of the enactment of the law giving rise to the claim.

The procedural impediments imposed by the court below to bar petitioner's takings claim are inconsistent with decisions of this Court and other circuits.

OPINIONS AND ORDERS BELOW

1. The Court of Appeals' November 1, 1991 opinion below is reported at 948 F.2d 575 and reproduced in Appendix ("App.") A, 1a-24a. That court's July 23, 1992 order granting rehearing and withdrawing its November 1, 1991 opinion is reported at 973 F.2d 704 and reproduced in App. B, 25a-27a.

2. The May 31, 1990 Memorandum of Decision of the United States District Court for the Central District of California is reported at 740 F. Supp. 772 and reproduced in App. C, 28a-46a. That court's unreported February 2, 1990 order denying respondent's motion for summary judgment is reproduced in App. D, 47a-56a, and its unreported December 2, 1987 order denying respondent's motion to dismiss is reproduced in App. E, 57a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. This petition is being filed within the time permitted by the Rules of this Court as extended by the October 10, 1992 Order of Justice O'Connor (A-297). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case principally involves the Fifth and Fourteenth Amendments to the Constitution; 42 U.S.C. § 1983; the California Mobile Home Residency Law, *Cal. Civ. Code* § 798, *et seq.*; and the Los Angeles Rent Stabilization Ordinance, Los Angeles Municipal Code Ch. XV, Art. I, § 151.06F. The pertinent portions of these provisions are set out verbatim in App. F, 58a-64a.

STATEMENT OF THE CASE

A. Statement of Facts

Azul is a family-owned corporation that has as its principal asset a mobile home park in the Los Angeles suburb of Pacific Palisades, "a prestigious residential community where single family homes have sold from four hundred thousand to four million dollars." App. C, 29a. Azul's mobile home park, which it has owned and operated since 1961, is "located on Pacific Coast Highway across from a state beach and many of the mobile homes in the park have ocean views." *Id.* The park is on sloping property that is underlain by unstable soils that cannot support permanent structures. Use of the property for other comparably profitable commercial use would be impossible.

Azul's tenants own their mobile home units, or "coaches," and lease from Azul the spaces on which the coaches are installed. App. A, 3a. Because "[m]oving a coach is a substantial and expensive undertaking . . ., vacating tenants generally sell their units to incoming tenants." *Id.*

In 1978, California enacted its Mobil Home Residency Law, *Cal. Civ. Code* § 798, *et seq.*, establishing numerous restrictions on the leasing of mobile home park spaces. A landlord may not terminate or refuse to renew a tenant's lease except for cause, *Cal. Civ. Code* §§ 798.55, 798.56;

may not in most circumstances require removal of a mobile home from the park, *id.* § 798.73; and must accept as a tenant any purchaser of a mobile home that has the ability to pay the rent and will not create a disturbance. *Id.* § 798.74.

In 1979, the City of Los Angeles enacted a Rent Stabilization Ordinance ("RSO"). That ordinance regulates the rent that can be charged in mobile home parks. *See generally* Los Angeles Municipal Code ("LAMC") Ch. XV, art. I. As originally enacted, park owners could negotiate new rents with new tenants when a mobile home was sold. In 1982, the RSO was amended to prohibit rent increases when a mobile home was sold to a new tenant. LA Ordinance 156,597. In 1984, this restriction was modified to permit rent increases at the time a coach was sold to the highest rent charged for a comparable site in the same park or 10%, whichever is less. LA Ordinance 158,891, codified at LAMC § 151.06F.

Market rents far outstripped the rents that Azul was permitted to charge under the RSO. At the same time, Azul was required to accept any new tenant who purchased a coach from an existing tenant and precluded from evicting tenants except for cause. As a result, Azul's tenants began to sell their rights to occupy their spaces at the low rent-controlled rate as a part of the sale price of their used coaches. The used coaches at Azul's park thus commanded substantially higher prices than used coaches sold at parks not subject to the RSO. *See, e.g.*, App. C, 36a, 38a-43a.

B. Proceedings Below

Azul filed suit in the United States District Court for the Central District of California on April 27, 1987, alleging that the RSO, in conjunction with the California Mobile Home Residency Law, "effect[ed] a taking of [Azul's] property for public use and benefit without payment of just

compensation."[1] Azul asserted a claim for just compensation under the Takings Clause of the Fifth Amendment, as applied to the States under the Fourteenth Amendment, as well as a claim for relief under 42 U.S.C. § 1983.[2]

The district court interpreted this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), to require application of California's one-year personal injury statute of limitations to both Azul's § 1983 claim and its direct takings claim under the Constitution. However, the district court found that the claims did not accrue in 1982 when the ordinance was enacted but applied the "continuing wrong theory for the accrual of the statute of limitations [under which] . . . the injury to the plaintiff occurs each time a mobile home located in its park is sold." App. C, 42a; App. E, 57a. Thus, the one-year limitations period limited Azul's remedy, but not its right to compensation in the first instance. Azul's remedy was therefore limited to losses occurring within one year prior to the filing of its complaint. App. C, 42a.

After a three-week trial, the district court held that the RSO amounted to an unconstitutional "physical taking" under the Ninth Circuit's decision in *Hall v. City of Santa Barbara*, 833 F.2d 1279 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).[3] The court found that the combined result of the RSO and California's prohibition on rejecting or evicting tenants was to "obligat[e] the landlord to offer a lease of indefinite term" to virtually any new tenant cho-

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[1] Complaint ¶ 10, at 3.

[2] Complaint ¶ 10 at 3-4; *see also* App. A, 19a & n.11; App. C, 29a-30a.

[3] The district court rejected respondent's contention that under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), Azul had failed to exhaust state administrative remedies. It held that Azul was not required to seek relief in the state system because *Hall* made an administrative application unnecessary. App. D, 53a.

sen by the vacating tenant. App. D, 34a. The court found that these provisions resulted in the transfer of a "premium" averaging $20,880.00 from Azul to each vacating tenant who first sold his or her coach after enactment of the RSO.[4] App. C, 42a.

The district court awarded compensation to Azul in the amount of $1,002,240, for the 48 coaches sold within the year prior to the filing of the complaint, entered a permanent injunction against enforcement of the RSO, App. C, 46a, and later awarded Azul attorney's fees.

On November 1, 1991, the Court of Appeals affirmed, holding that, under *Hall*, the RSO had "worked a taking of [Azul's] property without compensation by transferring an interest in its property to tenants." App. A, 3a.[5] But the court rejected the district court's "continuing wrong" theory of accrual and held that Azul's § 1983 claim was barred by the one-year state limitations period for personal injury actions applicable under *Wilson v. Garcia*. Relying on another Ninth Circuit "physical taking" decision interpreting *Hall—De Anza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991)—the court declared that Azul's § 1983 claim "begins to run the date the challenged ordinance is enacted." App. A, 19a. Azul's 1987 complaint challenging the 1982 ordinance was therefore untimely under § 1983. *Id.*

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[4] One tenant, for example, testified that she purchased a mobile home in Azul's park "in 1988 for $77,000.00. She then immediately sold the coach for $5,000.00 and purchased a new coach for $39,000.00 which she placed on her lot." App. C, 42a. "When asked why, she responded: 'The use of the land was what I paid for more than the place.' " App. A, 4a (quoting Trial Exhibit 432 at 7).

[5] The court affirmed the district court's conclusion, *see supra* note 3, that Azul's takings claim was ripe on the ground that *Hall* dispensed with the need to seek administrative relief. The court also held that filing an action in the California courts would have been futile in light of the California courts' previous repeated refusals to recognize takings claims under the circumstances of this case. App. A, 4a-5a.

However, the court below held that Azul also had a direct constitutional claim under the Takings Clause and that that claim was timely. The court observed that *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), removed "any doubt" as to whether a direct takings claim may be asserted under the Constitution. App. A, 20a. And it determined that California's five-year statute of limitations for "inverse condemnation" and the "most analogous federal statute of limitations"—the six-year provision applicable to inverse condemnation claims under the Tucker Act, 28 U.S.C. § 2401—were each more appropriate limitations periods for direct constitutional takings claims than the one-year personal injury statute applicable under *Wilson* to § 1983 claims. Because Azul's taking claim was "timely under either theory," the court left "for another case the question whether the state or federal limitations period applies." App. A, 22a.

The court below lifted the permanent injunction, finding that compensation for the taking was the only remedy available, and remanded the case for a redetermination of compensation based upon a Takings Clause claim for compensation for each space in Azul's park. App. A, 24a.

On November 15, 1991, respondent filed a petition for rehearing in the Court of Appeals. While respondent's rehearing petition was pending, this Court decided *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992). *Yee* involved a Takings Clause challenge to an Escondido, California rent control ordinance similar to the Los Angeles ordinance at issue here. The Court in *Yee* rejected the argument that the Escondido ordinance constituted a physical taking because it did not "compel a landowner to suffer the physical occupation of his property." 112 S. Ct. at 1534. The Court thus explicitly overruled the Ninth Circuit's *Hall* decision that was the precedent upon which both the district court and the Court of Appeals relied in this case. The *Yee* Court, however, explicitly left open, as not properly pre-

sented, the question whether California mobile home park laws constituted a "regulatory taking" requiring Fifth Amendment just compensation, although acknowledging that the constitutional issue presented by such laws was "no doubt important." *Id.*

In the wake of *Yee*, a divided panel of the Ninth Circuit granted respondent's petition for rehearing and withdrew its November 1, 1991 decision. App. B, 26a-27a. The court did not, however, reevaluate the merits of Azul's takings claim in light of *Yee*, which the majority did not even mention on rehearing. Rather, the majority without explanation reversed its previous ruling and held that the exclusive remedy for a litigant complaining of a constitutional violation was provided by 42 U.S.C. § 1983 and that Azul therefore "has no cause of action directly under the United States Constitution." App. B, 26a.

The court also went on to hold that since Azul's complaint was not filed within one year of the enactment of the ordinance to which it objected, its claim was barred by California's one-year limitations period for personal injury actions even if it constituted a direct constitutional claim. *See* App. B, 26a. The court did not mention, much less explain, why it was reversing its earlier position that direct constitutional claims would be governed either by California's five-year inverse condemnation limitations period or the federal Tucker Act six-year statute of limitations.

The dissent reasoned that Azul's case should be remanded to the district court for reconsideration in light of *Yee*, as well as *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). The dissenting judge pointed out that

> *Yee* not only overruled *Hall* . . . , upon which our opinion in this case was based; it implicitly overruled *De Anza*, which was premised upon the physical taking theory of *Hall*. *See De Anza*, 936 F.2d at 1086-87. *De*

> *Anza* is simply no longer good law for determining when a cause of action accrues for a takings claim. Thus, I would remand to the district court for determination of the statute of limitations issue in light of the intervening *Yee* and *Lucas* decisions, and the resultant obsoleteness of *De Anza*.

App. B, 27a.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant The Petition To Determine Whether The California And Los Angeles Laws Governing Mobile Home Rent Control Effect A Regulatory Taking

Last Term in *Yee*, the Court characterized the regulatory takings issue presented by this case as "no doubt important." The Court did not address that issue in *Yee*, however, because it was not properly presented. The issue continues to be exceedingly important to landowners and local governments and the Court should accept it for review in this case.

Yee indicated a number of factors to be considered in determining whether a mobile home rent control ordinance like the Los Angeles RSO, when viewed against California's restrictive Mobile Home Residency Law, constitutes a regulatory taking. Generally, compensation is required when government regulates the use of property to such an extent that "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." 112 S. Ct. at 1526.

The *Yee* factors are all presented by this case. They include:

(1) Park owners, such as Azul, may not determine who their tenants will be. *See Yee*, 112 S. Ct. at 1530 (suggesting that the ordinance's restriction on mobile home park owners' "ability to choose their incoming tenants" is

relevant to regulatory takings claim). California and Los Angeles laws materially restrict their ability to terminate a tenancy, and they generally may not do so when a mobile home is sold. *See, e.g.*, App. A, 9a-10a; App. C, 33a-34a.

(2) Reductions in rent or restrictions on rent increases such as those imposed by the Los Angeles RSO cause an increase in the value of the mobile home because the tenant owns not only the home but the right to remain in a location at a submarket price. *See, e.g.*, App. A, 3a-4a, 9a-11a; App. C, 33a-37a.

(3) The increased value of the mobile home can be converted by the tenant by selling his unit to a new owner. Thus, the RSO transfers a discrete interest in land, which has a significant, tangible and recoverable value, from the property owner to the tenant. App. A, 3a-4a; 9a-11a; App. C, 33a-37a.

(4) The landowner may not convert his property to another use to take advantage of the value otherwise transferred to the tenant. In this case, particularly, Azul has property that cannot be used for other purposes.

(5) The effect of the Los Angeles RSO, when combined with California state-wide restrictions on mobile home parks, is to single out mobile home park owners and impose on them peculiar and substantial burdens for the benefit of a particular class of individuals—tenants of mobile home parks at the time the RSO was enacted. *See Yee*, 112 S. Ct. at 1530 (suggesting that the fact that ordinance transfers "wealth" only to the incumbent tenant in residence when ordinance was enacted—rather than to "the incumbent and all future tenants"—is pertinent to regulatory taking issue). At the same time, the RSO does not protect incoming tenants by keeping mobile home park rents low. In fact, the incoming tenant will pay for lower rents in the form of the substantial premium he pays on purchasing his coach. App. A, 11a-13a.

While the Court of Appeals and the district court both ultimately couched their holdings on the merits of Azul's takings claim in terms of the "physical takings" doctrine of *Hall*, which was overruled by *Yee*, they did so in a way that unavoidably also addressed and decided the regulatory takings question. In fact, the record regarding the crucial issues relating to Azul's regulatory takings claim, *i.e.*, the purposes and economic effects of the ordinance, was fully and, indeed, exhaustively developed.[6] Based on that record, the Ninth Circuit held in its initial opinion that the Los Angeles RSO effected a taking:

> The city may choose to create such a windfall for current coach owners. If it does so, however, it must spread the burden on all its citizens, not target one small class of individuals to foot the bill. *See Nollan*, 483 U.S. at 841 .... "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole.' " *First English*, 482 U.S. at 318-19 ....

App. A, 23a-24a.

Moreover, the court below explicitly decided the issue whether the Los Angeles ordinance " 'substantially advance[s]' a 'legitimate state interest,' no matter how it is applied." *Yee*, 112 S. Ct. at 1532 (quoting *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 (1987)). The court rejected respondent's assertion that the ordinance "helped incoming tenants" by keeping the rents low, observing that

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[6] *See* App. A, 1a-19a, 23a-24a; App. C, 28a-46a. The district court's findings were based on substantial testimony from both expert and percipient witnesses on both sides of the issue and a voluminous documentary record developed during the course of the three-week bench trial.

> [t]he record here establishes that the buyer considering a coach in the rent-controlled park will be required to pay *much more* for it than if he bought the coach in a non-rent-controlled park . . . . The vacancy control ordinance does *nothing* to protect mobile home owners from the rigors of the marketplace. Instead it transfers the value of rent-controlled space—$20,880 per pad—from the mobile park landlord to the tenant.

App. A, 13a (emphasis added). The court below was "unable to see how this transfer of wealth from one group of citizens to another can serve any rational government purpose." App. A, 13a-14a.

Notwithstanding these findings, the Court of Appeals held that the ordinance was not a facial taking because it protected "*existing* tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." App. A, 14a (emphasis in original). But that rationale does not support the ordinance because there is no need to transfer a monetary windfall from the owner to the tenant to accomplish that objective. As this Court noted in a similar context, protecting existing tenants may well be "a good idea, but that does not establish that [Azul and other park owners] alone can be compelled to pay for its realization." *Nollan*, 483 U.S. at 891.

The regulatory takings question relating to mobile home rent control is important, substantial, and recurring[7] and warrants this Court's attention in this case.

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[7] *Compare Sandpiper Mobile Village v. City of Carpinteria*, No. B058435, 1992 Cal. App. LEXIS 1228 *10-*16 (Cal. Ct. App. Oct. 15, 1992) (holding that mobile home rent control ordinance "substantially advances a legitimate state interest" and thus does not effect regulatory taking) *with Colony Cove Association v. The City of Carson*, No. B062956 (Cal. Ct. App. Oct. 22, 1992) (copies of unpublished opinion lodged with the Clerk) (reversing trial court's dismissal based on *Yee* and concluding: "If, as appellant claims, the ordinance not only fails to achieve its

B. The Court Should Grant The Petition To Decide Whether § 1983 Provides The Exclusive Remedy For Fifth Amendment Takings Claims

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court characterized the question whether § 1983 is the exclusive remedy for constitutional violations by state and local governmental entities and officials as an "*extremely important*" one that had not been decided by the Court. *Id.* at 278 (emphasis added). The Court declined for prudential reasons to decide that question in *Mt. Healthy* and left it "for another day." *Id.* at 279; *see also Lake County Estates, Inc. v. Tahoe Planning Agency*, 440 U.S. 391, 399 (1979) (holding that takings claim could be brought under § 1983 but declining to decide whether claim existed under Fifth Amendment). But it is squarely presented in this case under particularly compelling circumstances: the decision below that § 1983 is the exclusive remedy for a takings claim is not only inconsistent with a series of decisions by this Court but also conflicts with the decisions of other circuits.

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court held that the Fifth Amendment itself provides directly both the right to and remedy for a taking without just compensation. The Solicitor General had argued in a brief *amicus curiae* for the United States that the Fifth Amendment is "prohibitory," not remedial, in nature and therefore affords no monetary remedy against a state or local government for taking property without just compensation.[8] The Court flatly rejected that argument, observing that its prior cases

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stated purpose of providing affordable mobile home housing but in fact works to increase the cost of such housing to all tenants save those in place when the ordinance was enacted, it is 'demonstrably irrelevant to the policy the legislature is free to adopt and thus irrational, rendering it an unconstitutional taking.' ").

[8] *See* Brief for United States as *Amicus Curiae* at 6, U.S. No. 85-

> refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'. . . *[T]hese cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.* See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655, n.21 (1981) (Brennan, J., dissenting), quoting, *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

Id. at 316 n.9 (emphasis added).

The Court in *First English* reiterated that in the event of a taking, a landowner may bring an action for inverse condemnation based on " 'the self-executing character of the constitutional provision with respect to compensation,' " *id.* at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)), a proposition that it had previously repeatedly articulated. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n.6 (1984) (right to bring action for taking or "inverse condemnation" "derives from 'the self-executing character of the constitutional provision with respect to condemnation' "); *United States v. Causby*, 328 U.S. 256, 267 (1946) (upholding jurisdiction

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1199. The Solicitor General argued that "the Takings Clause's prohibition of uncompensated takings does not imply a constitutionally-based compensation remedy where the prohibition has been violated," *id.* at 26, that the Fourteenth Amendment "reserved to Congress" the authority to establish a takings remedy applicable to the States, *id.* at 27, and that "Congress's enactment of 42 U.S.C. 1983 has eliminated any need for this Court to explore implicit constitutional remedies to be applied against governmental bodies acting in the area of local land-use regulation." *Id.*

However, the Solicitor General also pointed out that the property owner in *First English* had not invoked § 1983, either in the California courts or in this Court, and that "there accordingly [was] no reason" for the Court to address the implications of § 1983 for takings jurisprudence, U.S. *Amicus* Br. at 32, and the Court did not expressly do so.

of Claims Court to decide takings claims, which are "founded upon the Constitution"). As the Court observed nearly sixty years ago in *Jacobs v. United States*, 290 U.S. 13, 16 (1933), the right to recover compensation is "guaranteed by the Constitution," it "rest[s] upon the Fifth Amendment," and "statutory recognition [is] unnecessary . . . because of the duty imposed by the Amendment."

In its initial decision, the court below carefully reviewed these authorities and held that "[t]he Constitution itself provides both the cause of action and the remedy" for a taking without just compensation. App. A, 20a. Indeed, it declared, "[i]f there was *any* doubt on this score, it was removed by the Supreme Court in *First English*." *Id.* (emphasis added).

The Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), reached the same conclusion, rejecting the district court's holding below in that case that "constitutional inverse condemnation suits against state actors depend on § 1983" because "[w]e know from *First English* . . . that takings suits may be filed directly under the Constitution." *Id.* at 468. And in *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103, 105 (4th Cir. 1983), the Fourth Circuit quite clearly treated a property owner's takings claim as an independent cause of action that was predicated on the Constitution and exempt from the statute of limitations for § 1983 claims. *See id.* at 105 n.3.[9]

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[9] The district court in *Ocean Acres* anticipated this Court's holding in *First English*, expressly finding that

> [t]he inverse condemnation claim is actionable directly under the Fourteenth Amendment, and the "damages" sought are in fact "just compensation" guaranteed by the Fifth and Fourteenth Amendments . . . . The fact that the . . . action seeks recovery from local governments rather than the United States, does not diminish the "self-executing" char-

See also McDougal v. County of Imperial, 942 F.2d 668, 675 (9th Cir. 1991) (treating takings claim as separate and distinct from § 1983 claims).

Other courts, including the Ninth Circuit in a different case, have recognized that takings claims are different in kind from other constitutional claims because the Fifth Amendment explicitly provides for "just compensation." Thus, while 42 U.S.C. § 1983 may provide the exclusive remedy for some constitutional violations, it cannot limit claims for relief authorized explicitly by the Constitution itself. For example, in *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977), the First Circuit held that there was no implied remedy for damages under the Fourteenth Amendment against a municipality arising from alleged police misconduct during an arrest, but was careful to "emphasize the narrowness of [its] holding," expressing "no opinion as to whether specific guarantees, *e.g.*, the takings clause, might require a direct damages action against a political subdivision." *Id.* at 45.

Similarly, in *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978), a decision cited by the court below on rehearing (App. B, 26a), the Ninth Circuit rejected a direct constitutional cause of action for damages for police misconduct. But the *Molina* court

> recognize[d] that the propriety of allowing actions against municipalities directly under the Constitution may depend upon the specific right being protected .... *The Fifth Amendment's explicit requirement that compensation be paid for ... takings is, of course, an important factor distinguishing such actions from that proposed by [plaintiff] in this case.*

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acter of the just compensaton clause.

514 F. Supp. 1117, 1120 (E.D.N.C. 1981) (citing, *inter alia*, *Jacobs*, 290 U.S. at 16). The Fourth Circuit implicitly endorsed this conclusion on appeal, but rejected the property owner's takings claim on the merits. *See* 707 F.2d at 105.

578 F.2d. at 853 n.14 (emphasis added).

On rehearing, the Ninth Circuit in this case unaccountably, without explanation and without even mentioning *First English*, summarily rejected the rule that it had previously explicitly approved and joined the circuits on the opposite side of the question. *See* App. B, 26a ("Plaintiff has no cause of action directly under the United States Constitution.").[10] These courts hold that *all* constitutional claims *must* be brought under § 1983, even takings claims expressly provided for in the Fifth Amendment.

For example, in *Thomas v. Shipka*, 818 F.2d 496 (6th Cir. 1987), another decision relied on by the court below in its rehearing order (App. B, 26a), the Sixth Circuit rejected two of its previous decisions and held that "where a plaintiff states a constitutional claim under 42 U.S.C. § 1983, that statute is the *exclusive remedy* for the alleged constitutional violations." *Id.* at 499 (emphasis added).[11]

The Second and Eighth Circuits also have categorically held that § 1983 is the exclusive remedy for constitutional claims against state or local governmental entities or officials. *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979) (en banc) ("there is no place for a cause of action against

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[10] One of the cases cited by the Court of Appeals (App. B, 26a) was the district court's holding in *Bieneman*, which, as discussed above, was rejected on appeal by the Seventh Circuit as irreconcilable with *First English*. *See Bieneman*, 864 F.2d at 468.

[11] *Thomas*, 818 F.2d at 502-03 (rejecting *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), which permitted a takings claim to be brought directly under the Constitution because residents were effectively forced to sell their homes to city as part of urban renewal project; and *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978), which allowed the plaintiff to assert a direct constitutional cause of action for violation of the takings clause where government's use exceeded scope of easement). The Sixth Circuit in *Thomas* later reaffirmed its holding on the exclusivity of § 1983 after this Court remanded the case on other grounds. *Thomas v. Shipka*, 872 F.2d 772, 773 (6th Cir. 1989).

a municipality directly under the 14th Amendment, since the plaintiff may proceed under § 1983"); *Owen v. City of Independence*, 589 F.2d 335, 337 (8th Cir. 1979) ("By enacting section 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities. Consequently, no reason exists to imply a direct cause of action under the fourteenth amendment."), *rev'd on other grounds*, 446 U.S. 994 (1980). In fact, the Ninth Circuit itself, in a decision relied on by the court below in its rehearing order, has held that "there is no basis for a constitutionally based suit . . . where the plaintiff has a statutory remedy under § 1983." *Ward v. Caulk*, 650 F.2d 1144, 1148 (9th Cir. 1981).[12]

The Court's rationale in *First English* presumably would have removed "any doubt" (App. A, 20a) about the viability of a direct cause of action in the unique context of the Takings and Just Compensation Clauses. However, as demonstrated above, the law remains in a state of rampant confusion on this issue. Perhaps because the Court in *First English* did not explicitly discuss in its opinion the relationship between § 1983 and the direct remedy for takings afforded by the Fifth Amendment,[13] the court below assumed that Congress was authorized to and did, in fact, establish a statutory remedy that displaces the direct remedy explicitly approved in *First English*. But there is nothing in this Court's jurisprudence of constitutional remedies to suggest that that is true.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that it would not *imply* a direct constitutional cause of

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[12] The Fourth Circuit, notwithstanding its decision in *Ocean Acres*, declared in a subsequent case outside the takings context that "*any* cause of action against [local officials] for unconstitutional conduct under color of state law could *only* proceed under § 1983." *Hunt v. Robeson County Department of Social Services*, 816 F.2d 150, 152 n.2 (4th Cir. 1987) (emphasis added). The Ninth Circuit on rehearing interpreted *Hunt* to mean that direct takings claims are foreclosed. App. B, 26a.

[13] *See supra* note 8.

action when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution, and viewed as equally effective." *Id.* at 18-19 (emphasis in original). Not only did Congress fail "explicitly [to] declare" that § 1983 was a "substitute" for direct takings claims, but this case—unlike *Carlson* (which involved an alleged Eighth Amendment violation) and virtually every other kind of § 1983 case—does *not* involve an "implied" constitutional remedy at all. Rather, it concerns the only express remedy that was authorized by the Framers of the Constitution.

Indeed, as then-Justice Rehnquist recognized in his dissenting opinion in *Carlson*, takings claims constitute an entirely separate species of the law of constitutional remedies. The "*express language* of [the Just Compensation Clause of the Fifth Amendment] *requires* that 'compensation' be paid for any governmental taking." *Id.* at 43 n.9 (Rehnquist, J., dissenting) (emphasis added). Whatever the rule may be with respect to other constitutional claims that may be asserted pursuant to § 1983, takings claims may be brought directly under the Constitution.

C. The Court Should Grant The Petition To Determine The Statute Of Limitations For Takings Claims Asserted Directly Under The Constitution

This Court has not decided what statute of limitations, if any, governs the direct constitutional takings remedy recognized in *First English*. As a result, the law is exceedingly unsettled on this point. And this case is a perfect example of the problem. The Court of Appeals applied *three different limitations periods* to Azul's takings claim. In its first opinion, the court observed that "[a]lthough the Constitution gives Azul Pacifico a right of action, it does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations." App. A, 21a. The court found that Azul's takings claim was most analogous to a state law "inverse

condemnation" claim, making the California five-year statute of limitations applicable to such claims the most suitable state analog for Azul's Fifth Amendment claim. App. A, 22a.

However, the court below also recognized that federal courts are precluded from adopting state limitations periods if doing so would contravene the governing federal policies at stake in the litigation. *Id.* "Because Azul Pacifico's claim is brought directly under the Constitution to secure rights guaranteed under by the Fifth Amendment, varying state statutes of limitations may thwart the federal interest in uniform treatment of takings cases." *Id.* The court therefore looked to the most analogous federal statute of limitations—the Tucker Act, 28 U.S.C. § 2401—which is applied to inverse condemnation claims against the United States and allows six years to bring such a claim. *Id.* In the end, the court held that Azul's takings claim was timely under either statutory period and "[left] for another case the question of whether the state or federal limitations period applies." *Id.*

On rehearing, the Court of Appeals disregarded entirely its previous conclusions and selected yet a third limitations period: the state one-year personal injury statute of limitations that governs § 1983 claims under this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). The court offered no explanation for this abrupt departure from its prior ruling, and did not even cite any takings cases to support it. However, conflicting authority on this issue does exist.

In *Bieneman*, 864 F.2d at 468-69, the Seventh Circuit rejected the argument that the state limitations period for inverse condemnation claims should govern direct constitutional takings claims. The *Bieneman* court, like the first Ninth Circuit decision here, found "questionable" the notion "that state rather than federal law supplies the period of limitation for a claim arising directly under the Con-

stitution," *id.* at 468, and stated that "[a]n appropriate benchmark for this purpose might be the six years provided by 28 U.S.C. § 2401(c) for suits against the United States, a period that is employed to mark the outer limits for purposes of inverse condemnation actions under the Tucker Act." *Id.* Nonetheless, despite its reservations and to avoid what the court perceived would be "uncertainty" and "enervating litigation" if a uniform federal period was chosen that differed from the rule that applies to § 1983 claims, *Bieneman* held that the "period for direct actions must be the same for § 1983 actions." *Id.* at 470.

The Seventh Circuit's holding in *Bieneman* and the Ninth Circuit's most recent decision in this case directly conflict with the Fourth Circuit's decision in *Ocean Acres*, 707 F.2d at 105 n.3. The court in *Ocean Acres* held that the three-year North Carolina personal injury statute of limitations that it applied to the plaintiff's § 1983 claims arising out of a taking "does *not* apply to the inverse condemnation claim." *Id.* (emphasis added) (citing *Hoyle v. City of Charlotte*, 172 S.E.2d 1, 11 (N.C. 1970)). The Fourth Circuit instead endorsed the position that

> there is no statute of limitations applicable to a claim for just compensation .... If the plaintiff's property has been taken by defendants, plaintiff is entitled to just compensation under the Constitution *regardless of when the taking occurred.* The time of the taking is relevant only for purposes of valuing the "just" compensation due.

Ocean Acres Limited Partnership v. Dare County Board of Health, 514 F. Supp. 1117, 1123 (E.D.N.C. 1981) (emphasis added).

Other district courts in the Fourth Circuit have, despite *Ocean Acres*, applied the state personal injury limitations periods to direct taking claims. *See, e.g., Jackson v. City Council of Charlottesville*, 659 F. Supp. 470, 474 (W.D. Va. 1987), *aff'd*, 840 F.2d 10 (4th Cir. 1988).

Such unclarity in the law no doubt played some part in prompting the Ninth Circuit, in *McDougal v. County of Imperial*, 942 F.2d 668, 675 n.5 (9th Cir. 1991), two months before its initial opinion here, to defer consideration of the question whether a property owner's takings claim under the Constitution also was subject to the one-year personal injury limitations period that barred the plaintiffs' § 1983 claims in that case.[14] The actions of other courts confirm the perplexing nature of the limitations question. *See, e.g., Hiji v. City of Garnett*, Civ. A. No. 87-2296-0, 1990 WL 37617 (D. Kan. Mar. 7, 1990) (certifying, after reversal and remand on the basis of unclarity of Kansas law and suggestion by the Tenth Circuit to so do, to the Kansas Supreme Court the question whether the three-year statute of limitations for implied contract actions applied to inverse condemnation actions, and, if not, what was the applicable limitations period), *certified question answered by* 804 P.2d 950 (Kan. 1991) (15-year limitations period for "unspecified real property actions" applicable to takings claim).

The law cries out for clarification as to what statute of limitations, if any, applies to takings claims brought directly under the Fifth and Fourteenth Amendments. And the traditional federal "borrowing" doctrine for selecting limitations periods is unsuitable to solve this question because it was developed for and has always been applied to *statutory* causes of action, rather than express constitutional remedies. Where "Congress fails to provide a statute of limitations for a federal cause of action," the Court assumes that Congress is aware of the judicial practice of

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[14] Prior to *McDougal*, one Ninth Circuit panel had applied state personal injury limitations periods to takings claims, *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), and a district court in that circuit had applied California's one-year limitations period for presentation of claims for money or damages against public entities. *See Sanfilippo v. County of Santa Cruz*, 415 F. Supp. 1340, 1342-43 (N.D. Cal. 1976).

importing state limitations periods and ordinarily " 'intends by its silence that [the Court] borrow state law.' " *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991) (quoting *Agency Holding Corp. v. Malley Duff & Assocs.*, 483 U.S. 143, 147 (1983)); *see also Wilson*, 471 U.S. at 270.

There are several significant exceptions to this general statutory borrowing doctrine. For example, the Court has held that some federal rights of action are not subject to *any* statute of limitations. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (federal equitable rights); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977) (EEOC enforcement actions following administrative processes). Moreover, the Court has looked to federal, rather than state, law for a limitations rule when federal law "clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Lampf*, 111 S. Ct. at 2778 (citations and internal quotations omitted).

The Court of Appeals here engaged in unusual and unwise double "borrowing" to determine the limitations period for direct constitutional claims. For the constitutional claim, it turned to the limitations period for federal statutory claims for constitutional violations. Because that law, 42 U.S.C. § 1983, had no statutory limitations period, it, in turn, had to resort to state limitations periods that had no relationship to the federal constitutional policies at issue, the practicalities of takings litigation or the substantive characteristics of a takings claim. *Wilson v. Garcia* chose the state personal injury limitations period for § 1983 claims mainly because that statute encompasses such a broad range of widely differing constitutional violations and a uniform period was perceived as necessary to avoid uncertainty and time-consuming litigation over which state period best fit the particular claim and facts at issue in a particular case. *See* 471 U.S. at 271-80.

But that logic cannot be carried over to claims for compensation guaranteed by the federal Constitution. If such claims are to be governed by any limitations period at all, there are far more suitable state and federal statutes of limitations relating to closely analogous causes of action, such as inverse condemnation and adverse possession,[15] that should be used in takings claims brought directly under the Fifth Amendment, as the court below recognized in its initial opinion. Moreover, it may well be that "borrowing" a statutory limitation for a claim guaranteed explicitly by the Constitution is simply impermissible and that the passage of time affects only the amount of "just compensation," restricted only by the more flexible equitable rule of laches. Laches is " 'not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the

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[15] Takings claims are generally subject to far longer limitations periods under state and federal law than the one-year California personal injury rule applied here. In addition to the five-year period that actually applies to takings claims in California and the six-year period that governs takings claims against the federal government, *see* App. A, 22a, examples include: Indiana, 15 years, Ind. Code § 34-1-2-3 (1976 Ed.), *Scates v. State*, 383 N.E.2d 491 (Ind. 1978); Kansas, 15 years, *Hiji v. City of Garnett*, 248 Kan. 1, 804 P.2d 950 (1991); Maryland, 3 years, Md. Code Ann. Cts. & Jud. Proc. § 5-101, *Millison v. Wilzack*, 77 Md. App. 676, 551 A.2d 899 (1989); Minnesota, 6 years, Minn. Stat. § 541.05, subd. 1 (1986), *Beer v. Minnesota Power & Light*, 400 N.W.2d 732 (Minn. 1987); Nebraska, 20 years, *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981); Nevada, 15 years, *White Pine Lumber Co. v. City of Reno*, 801 P.2d 1370 (Nev. 1990); New Hampshire, 20 years, N.H. Rev. Stat. Ann. § 508.4, *Sundell v. Town of New London*, 409 A.2d 1315 (N.H. 1979); Pennsylvania, 21 years, 42 Pa. Cons. Stat. § 5530(a)(3), *Palando v. Urban Redevelopment Authority of Pittsburgh*, 411 A.2d 1274 (Pa. 1980); Texas, 10 years, *Shepherd v. City of Austin*, 543 S.W.2d 185 (Tex. Civ. App. 1976); Washington, 10 years, *City of Walla Walla v. Conkey*, 6 Wash. App. 6, 492 P.2d 589 (1971).

Some states apply *no* limitations period to takings claims. *See*, e.g., *Hoyle*, 172 S.E.2d at 10.

property or the parties.' " *Holmberg v. Armbrecht*, 327 U.S. at 396 (quoting *Galliher v. Cadwell*, 145 U.S 368, 373 (1892)).

" 'Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson*, 471 U.S. at 266 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). The current confusion in the federal courts regarding the limitations rules governing important explicit constitutional rights could not be more complex, ill-defined and destructive. This important area of constitutional remedies must be clarified by this Court.

D. The Court Should Grant The Petition To Determine When A Takings Claim Accrues For Statute Of Limitations Purposes

The Court of Appeals held that takings claims, whether asserted under § 1983 or directly under the Fifth Amendment, invariably accrue and the limitations period begins to run when the challenged statute is enacted. However, the court relied for this holding on its decision in *De Anza*, a physical takings case that dealt only with the doctrine established by the Ninth Circuit's *Hall* decision. *De Anza* was based on the notion, rejected in *Yee*, that "the taking occurred when the property right was transferred from landlord to tenant, which was at the first imposition of vacancy control." App. A, 19a (citing *De Anza*, 936 F.2d at 1086-87). As the dissent below correctly recognized, App. B, 27a, *Yee* implicitly overruled *De Anza's* holding that, because mobile home rent control ordinances effect a physical taking, the cause of action accrued at the time of enactment.

After hearing detailed evidence concerning the operation and effect of the laws at issue in this case, the district court correctly ruled that the continued enforcement since 1982 of the RSO caused injury to Azul, and gave rise to a takings claim, each time a mobile home located in the

park was sold. App. C, 42a. And, irrespective of the source of the limitations period, "*federal* law governs the question of when [a] . . . limitations period begins to run." *McCone v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988) (emphasis added). Therefore, in determining that Azul's direct takings and § 1983 claims were timely even under a one-year limitations period, the district court properly invoked the federal accrual principles articulated by this Court in *United States v. Dickinson*, 331 U.S. 745, 749 (1946).[16]

Dickinson involved a takings claim under the Tucker Act against the United States for flooding a property owner's land when the government built a dam. The United States argued that the six-year statute of limitations began to run "when the dam began to impound water," or, alternatively, when "the property of the respondent's was partially submerged for the first time." *Id.* at 747.

This Court rejected that argument. The Court noted that the government could have invoked its power of eminent domain and thereby "fixed the time when the property was 'taken,' " but "chose not to do so . . . , thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of a taking could no longer be in controversy." *Id.* at 747-48. The Court declared that the property owner's right to compensation was "founded upon the Constitution," which " 'is intended to preserve practical and substantial rights not to maintain theories.' " *Id.* (quoting *Davis v. Mills*, 194 U.S. 451, 457 (1904)). Accordingly, the Court held that

> [p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an

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[16] The district court also relied upon decisions applying the same principle in *Jackson*, 659 F. Supp. at 475, and *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 266 (N.D. Cal. 1978). *See also Lockary v. Kayfetz*, 587 F. Supp. 631 (N.D. Cal. 1984).

> extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action"—when they are born, whether they proliferate and when they die.

331 U.S. at 748.[17]

DeAnza, and the Court of Appeals here, took precisely the kind of rigid, formalistic approach to accrual of takings claims that was rejected in *Dickinson*. The court below simply ignored the fact that, similar to *Dickinson*, it would have been wholly impractical and premature for Azul to bring a claim immediately upon enactment of the ordinance.[18]

It is Azul's inability to raise rent when a coach is sold that is the source of its complaint here. Only by examining, as the district court did, the purposes of the regulation and its economic effects on the sales of coaches can any informed determination be made as to whether or not a regulatory taking has occurred. The district court found that the disproportionate burden of overcompensating the owner of the wasting asset (the coach) out of the pocket of the owner of the appreciating asset (the park) is imposed only upon sale of a mobile home coach. Therefore, the ordinance operates to take property when a coach is sold. By the same token, each time a coach is sold, a taking occurs.

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[17] The continued enforcement of an unconstitutional statute cannot be insulated from attack by a statute of limitations. *See Virginia Hospital Association v. Bailes*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd*, 496 U.S. 498 (1990).

[18] *Dickinson* outlined several impracticalities in bringing a takings claim for flooding as soon as a dam was completed or as soon as floodwaters first covered the plaintiff's property. 331 U.S. at 749. The same sort of impracticalities apply here.

There is a further practical reason for applying this accrual rule to these facts. Under the *De Anza* theory, the taking applies to every space in the park upon the enactment of the rent control ordinance. This would subject municipalities to substantial damage awards which they might avoid by modifying their ordinances to avoid unconstitutional results and only paying compensation as to those coaches that had been sold. *De Anza* would require that the municipality pay compensation as to every coach in a park. This is how the Ninth Circuit panel initially decided the case. App. A, 18a-19a.

Finally, this Court has never held that takings claims automatically arise the moment a challenged regulatory provision is passed into law. Indeed, in a slightly different context, this Court has rejected the notion that a regulatory takings challenge to a statute or regulation arises upon enactment. "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstance." *Hodel v. Virginia Surface Mining & Reclamation Association.*, 452 U.S. 264, 295 (1981); *see also Pennell v. City of San Jose*, 485 U.S. 1, 8-9 (1988) (premature to consider as applied takings challenge to rent control ordinance until actual, concrete factual setting makes such a decision necessary).

CONCLUSION

For the foregoing reasons, the petition should be granted and this case set for plenary consideration.

Dated: November 20, 1992

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals,
Ninth Circuit

Nos. 90-55853, 90-56066
948 F.2d 575

AZUL PACIFICO, INCORPORATED, a California corporation,

Plaintiff-Appellee,

v.

CITY OF LOS ANGELES, a municipal corporation,

Defendant-Appellant.

AZUL PACIFICO, INCORPORATED, a California corporation,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation,

Defendant-Appellee.

Argued and Submitted July 11, 1991.
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Decided Nov. 1, 1991.

Gwendolyn Ryder Poindexter, Deputy City Attorney, Los Angeles, Cal., for defendant-appellant.

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Appeal from the United States District Court for the Central District of California.

Before POOLE, KOZINSKI and LEAVY, Circuit Judges.

KOZINSKI, Circuit Judge.

In *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir.1986), cert. denied, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), we held that a mobile home rent control ordinance could operate to give the tenants a possessory interest in the park owners' land, and thus effect a physical taking of the park owners' property. *Hall* was an appeal from the dismissal of the park owners' action; we held merely that a cause of action *could* be stated. Accord *Pinewood Estates of Michigan v. Barnegat Township Leveling Bd.*, 898 F.2d 347, 353 (3d Cir.1990); see also Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L.Rev. 399, 456-63 (1988).

This is the first appeal to reach this court after a trial on the merits of the takings claim; what was only a theory in *Hall* was found as fact by the district court. We consider the city of Los Angeles's appeal from the district court's determination that a provision of its rent control ordinance violates the Fifth and Fourteenth Amendments' prohibition

against taking of private property for public use without just compensation. *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F.Supp. 772 (C.D.Cal. 1990).

Facts

Denizens of mobile home parks own their dwelling units, or "coaches," but rent the spaces, or "pads," on which the coaches are installed. The mobile homes themselves really aren't: Moving a coach is a substantial and expensive undertaking. Consequently, vacating tenants generally sell their units to the incoming residents. In California, a landlord may not terminate or refuse to renew a tenant's lease except for cause (Cal.Civ.Code §§ 798.55, 798.56); generally cannot require removal of a mobile home from the park upon vacancy (id at § 798.73); and must approve a purchaser if he has the ability to pay the rent and will not create a disturbance (id at § 798.74). Moreover, Azul Pacifico's mobile home park and others in Los Angeles are subject to the city's Rent Stabilization Ordinance (RSO), which regulates the rent they can charge. Los Angeles Municipal Code (LAMC) Ch. XV, Art. I. In 1982 the city added a provision prohibiting landlords from raising the rent on mobile home pads when the coaches were vacated. LA Ordinance 156,597. the provision was repealed in 1984, and a substitute provision was adopted allowing landlords to raise the rent to the highest rent charged for a comparable site in the same park or 10 percent, whichever is less. LA Ordinance 158,891, codified at LAMC § 151.06F. It is this "vacancy control" provision which Azul Pacifico claims worked a taking of its property without compensation by transferring an interest in its property to the tenants.

In *Hall*, we held that the park owners would be entitled to compensation under the takings clause if the tenants could transfer this property interest to others, the interest had a market value and it was in fact traded on a market. 833 F.2d at 1276. The district court, in a well-reasoned

opinion, found each factor was met in this case. The value of the possessory interest transferred by operation of law from landlord to tenant is reflected in the "premium" the tenant receives upon sale of the coach—the amount by which the sale prices of coaches in rent-controlled parks exceed those in uncontrolled areas. One Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5000 and had it removed from the pad. When asked why, she responded: "The use of the land was what I paid for more than the place." Trial Exhibit 432 at 7. In fact, both the plaintiff's and the defendant's experts agreed that there was a substantial premium paid on coaches in rent-controlled parks—they just calculated the amount differently.

Discussion

I

The Supreme Court has established a two-pronged ripeness test for takings claims. First, the property owner must obtain a final administrative decision regarding the application of the ordinance to its property. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 186-94, 105 S.Ct. 3108, 3116-20, 87 L.Ed.2d 126 (1985). Second, the property owner must avail itself of state judicial remedies in an effort to obtain "just compensation." Id at 194-97, 105 S.Ct. at 3120-22.

When the alleged taking occurs as a result of a physical occupation of the property, the landowner need not exhaust administrative remedies before suing in federal court: "Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact." *Hall*, 833 F.2d a 1282 n. 28. Because a physical invasion is itself a final governmental action, the first *Williamson* ripeness requirement is always satisfied in such cases. See *Sinaloa Lake Owners Assoc. v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th

Cir 1989), cert. denied, ___ U.S. ___ , 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

Furthermore, the California state courts have repeatedly held *Hall*-type takings claims to be non-compensable. See, for example, *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991), review denied, 1991 WL 73987, 1991 Cal.Lexis 3294 (July 17, 1991); *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990), review denied, 1990 WL 165782, 1991 Cal.Lexis 353 (Jan. 24, 1991), cert granted, ___ U.S. ___ , 112 S.Ct. 294, 116 L.Ed.2d 239 (1991). We have held that the futility of a state court action satisfies the second *Williamson* ripeness requirement: Property owners in this type of case can file immediately in federal court. *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 954-55 (9th Cir. 1991).[1] Azul Pacifico's claim was ripe, and the district court did not err in asserting jurisdiction over the case.

II

Hall recognized a three-part test for takings claims based on mobile home rent controls: First, does the governmental action constitute a taking? Second, does the action advance a legitimate governmental interest? And third, has just compensation been paid? Compensation must be provided when the first question is answered in the affirmative and either of the next two in the negative. 833 F.2d at 1274-75. We address each in turn.

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[1] In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-22, 107 S.Ct. 2378, 2385-89, 96 L.Ed.2d 250 (1987), the Supreme Court disapproved the California state courts' refusal to provide compensation for temporary regulatory takings. We have held that "futility" will not serve to excuse such claims after the date of the *First English* decision. *Jama Construction v. City of Los Angeles*, 938 F.2d 1045, 1047-48 & n. 2 (9th Cir.1991). This case, however, involves a physical rather than a regulatory taking; the California courts have consistently rejected takings claims based upon this theory. See *Sierra Lake*, 938 F.2d at 955.

A. There is a fundamental distinction in takings jurisprudence between regulatory takings and takings effected by physical occupation. Compare *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (regulatory), with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (physical occupation). The regulatory analysis requires courts to engage in "essentially ad hoc, factual inquiries." *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). Governmental regulation will not be held to take private property unless, in Justice Holmes's words, it "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). In contrast, Justice Marshall reminded us, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, [the Supreme] Court has *invariably* found a taking." *Loretto*, 458 U.S. at 427, 102 S.Ct. at 3171 (emphasis added). In *Hall* we held that the challenged ordinance could be found to transfer a possessory interest in the land to the mobile home tenants, and thus constituted a physical occupation analyzed under the per se approach. 833 F.2d at 1275-80; see also *Pinewood Estates*, 898 F.2d at 353.

Since *Hall*, the Supreme Court has decided *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), and *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). The city and some amici argue that these decisions undermine the rationale of *Hall*, but they are mistaken. In both cases the Court employed regulatory takings analysis, holding that the challenged regulations were legitimate exercises of the police power. And in both cases the Court was careful to distinguish the physical occupation cases.

In *Pennell*, apartment building owners challenged a rent control ordinance which allowed rents to rise up to 8 percent every year, with a provision for administrative review of requests for greater increases. The hearing officer was

charged with taking into account several factors, including "hardship to a tenant"; the owners alleged that this provision "accomplishes a transfer to the landlord's property to individual hardship tenants." 485 U.S. at 9, 108 S.Ct. at 856. The Court, however, refused to address the issue: Because the hearing officer had never actually reduced a rent based on the hardship provision, the case did not "present a sufficiently concrete factual setting for the adjudication of the takings claim." Id at 10, 108 S.Ct. at 857. Unremarkably, the *Pennell* Court declined "to reconsider the constitutionality of rent control *per se*," id at 12 n. 6, 108 S.Ct. at 858 n. 6; it also did not address the contention that the challenged provision effected a physical taking of the owners' property. Id at 11 n. 5, 108 S.Ct. at 857 n. 5. *Pennell* therefore has no bearing on the issue presented here—whether the challenged ordinance operates as a taking of mobile home park owners' property through physical occupation.

The regulation challenged in *Florida Power* controlled the rents utilities could charge for attaching cable to utility poles. The utility company relied on *Loretto*, which had held that a city ordinance authorizing a company to attach television cable equipment to private buildings effected a taking. The Supreme Court distinguished *Loretto* on the ground that the utilities were not *required* to grant cable companies space on the poles and therefore there was no physical occupation. 480 U.S. at 251, 107 S.Ct. at 1111. "This element of required acquiescence is at the heart of the concept of occupation." Id at 252, 107 S.Ct. at 1112.

The city argues that our cases is just like *Florida Power* because the mobile home tenants and park owners enter into lease agreements voluntarily. But the Court in *Florida Power* stated: "We do not decide today what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection, to *enter into, renew, or refrain from terminating* pole attachment agreements." Id at 251-52 n. 6, 107 S.Ct. at 1111-12 n. 6 (emphasis added).

This is the situation here, where the RSO, read in conjunction with California's Mobilehome Residency Law, has precisely that effect.[2]

An examination of the three factors the Supreme Court highlighted in *Florida Power* supports this conclusion. First, Azul Pacifico is required to enter into agreements: When a tenant vacates and sells a coach, the park owner *must* rent the pad on which it sits to the purchaser. Cal. Civ.Code § 798.74. Second, the park owner *must* renew pad rental agreements. Id at §§ 798.55, 798.56. Finally, the park owner *must* refrain from terminating such agreements except in sharply circumscribed circumstances. Id.

Standing alone, these requirements of state law may well be constitutional. See, for example, *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), appeal dismissed, 489 U.S. 1002, 109 S.Ct. 1104, 103 L.Ed.2d 169 (1989)[3] But the district court found that the rent and vacancy control provisions of the city's ordinance in conjunction with the background state law rules operated to transfer Azul Pacifico's property to its tenants,

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[2] In *Hall*, the ordinance actually required the granting of a lease. 833 F.2d at 1273. This is a distinction without a difference. We noted in *Hall* that "certain features of the Santa Barbara ordinance" made it "peculiarly susceptible" to a claim for a taking by physical occupation. Id at 1276. All of those "features" are present in the Los Angeles RSO with the exception of the indefinite lease requirement; as discussed in the text, the practical effect is identical. Cf. *Pinewood Estates*, 898 F.2d at 349 (no requirement that landlords grant leases).

[3] The city argues that *Eamiello* and another Connecticut case, *Thompson v. Merlino Enterprises, Inc.*, 208 Conn. 656, 545 A.2d 1094, appeal dismissed, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), support its position. But neither of these cases involved rent controls: The issue in both cases was whether requiring park owners to permit coaches to remain onsite after sale in itself violated the takings clause. Thus the Supreme Court's dismissal of the appeals for want of a substantial federal question has little bearing on the continuing viability of *Hall*, which relied in its takings analysis on the convergence of the rent control ordinance and the removal statute.

thus violating the takings clause. 740 F.Supp. at 775-76; see also *Pinewood Estates*, 898 F.2d at 348-49 (considering interaction of state and local laws nearly identical to this case).

In *Hall*, we held that the park owners would have a constitutional right to compensation for the taking of their property if they could prove

> that the [challenged ordinance] has transferred a possessory interest in their land to each of the [ ] tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value.

833 F.2d at 1276. After careful review of all the evidence, the district court in this case found that each of these elements was satisfied. We review its findings for clear error and find none.[4]

Mobile home park owners effectively can't evict tenants, and they cannot charge market rent. See Cal.Civ.Code §§ 798.55, 798.56 (severely restricting landlords' ability to evict or refuse to renew tenants' leases); LAMC § 151.04 (prohibiting landlords from charging more than the controlled rent). The right to occupy the pad indefinitely while paying below-market rent is thus established by law. The district court's finding that this element of the *Hall* test

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[4] The city mistakenly argues that the district court's determinations as to the *Hall* factors are questions of law reviewable de novo. Although the answer to the ultimate question—was there a taking?—requires a legal conclusion, the predicates are factual determinations. So, for example, in *United States v. Causby*, 328 U.S. 256, 259, 266-67, 66 S.Ct. 1062, 1064, 1068-69, 90 L.Ed. 1206 (1946), the Supreme Court accepted the Court of Claims's factual conclusion that the existence of government airplanes in the airspace immediately above Causby's property destroyed its value, while reserving for itself the legal conclusion of whether the takings clause required compensation.

is met is amply supported by the record. See 774 F.Supp. at 755-77.

The district court also found that the RSO's vacancy control provision operated to transfer a property right from the park owner to the tenants. It further found that this interest was transferable, had a market value and was in fact traded on a market. Id. These findings are all supported by the record.

A tenant who sells his coach is able to command a premium for it; the premium represents the right to occupy the pad on which it sits at below-market rates. As the district court found, "it is the fact that rents cannot be raised more than ten percent when a tenant sells his mobile home and the buyer remains on the same pad that works the unconstitutional taking under *Hall*, not the state law requiring the landlord to renew a tenancy upon expiration of the original lease." Id at 776; see also *Pinewood Estates*, 898 F.2d at 349, 352-53 (stressing importance of vacancy control in takings analysis). The tenant is given an interest in the land; this interest is worth the capitalized value of the difference between market rent and he controlled rent. See Hirsch & Hirsch, 35 UCLA L.Rev. at 447-48. The vacancy-control premium represents the value of the park owner's property transferred by the RSO to the owners of the coaches. See *Hall*, 833 F.2d at 1276-77. The court relied on expert testimony that coaches in rent controlled parks sold for considerably more than in parks where market rents prevailed, even after accounting for other variables such as location and amenities. Azul Pacifico's expert calculated the premium at $20,880; the city's at $5,000. The district court, as it was free to do, chose to accept the higher figure.

This vacancy-control premium establishes the value of the property right transferred by the RSO from landlord to tenant. The city tries to avoid this conclusion by arguing that mobile home consumers were not able to assign a

value to the property right transferred to tenants by the RSO. The district court properly dismissed this argument: "[T]he buyer's lack of knowledge of economics does not mean that the market does not exist, it merely shifts the knowledge about the value of the property right from the buyers to the brokers, who act as agents of the buyers." 740 F.Supp. at 777. The premium itself, the existence of which the district court found as a matter of fact, establishes that selling tenants can monetize the property right assigned to them by the RSO. The market for mobile homes is coextensive with the market for this interest; the price of the transferred property right can be disaggregated by looking—as the district court did—at coach prices in similar parks not subject to vacancy control.

Because the district court's findings as to the factual predicates are not clearly erroneous, we agree with its conclusion that there was a taking of Azul Pacifico's property. See *Hall*, 833 F.2d at 1277-78; *Pinewood Estates*, 898 F.2d at 353.

B. We next consider whether the governmental action furthers a legitimate interest. *Hall*, 833 F.2d at 1274, 1280-81.

The city characterizes the California mobile home market as a "monopoly," and argues that the RSO is an acceptable correction of "market failure." But the city argues from a false premise. There are almost 400,000 mobile home spaces in the state, as well as millions of houses, apartments and other dwellings; the various modes of housing are, with various elasticities, fungible. It is inconceivable that in such a market any person or group could *artifically* reduce the supply of housing and thus increase its price—the conventional definition of a monopoly.

In fact, the California housing market is not an example of "market failure" at all; it reflects the operation of normal market forces. According to the law of supply and

demand, the market price of a product will rise as consumers want more of it, unless the supply increases commensurately. If the price of housing in Los Angeles is high, this is simply the free market's mechanism for ensuring efficient allocation of existing housing resources and creating incentives for an increase in the supply of housing which, eventually, will drive down the price.

The city argues that, while we wait for the invisible hand to do its work, unscrupulous park owners will take advantage of tenants, many of whom are elderly and on fixed incomes. We have previously recognized in the substantive due process context that this is a valid basis for governmental regulation of the landlord-tenant relationship. *Sierra Lake*, 938 F.2d at 958. But the Supreme Court has held that the relationship between the means and the ends must be closer for purposes of taking clause analysis. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-35 & n. 3, 107 S.Ct. 3141, 3147-48 & n. 3, 97 L.Ed.2d 677 (1987).

In *Nollan*, the Court considered a state zoning commission requirement that sea-side landowners grant a public beach easement as a condition for obtaining a building permit. The Court agreed with the state that, if the regulation itself were a valid exercise of the police power, conditioning the permit on the grant of the easement would also be constitutionally permissible. It held, however, that the result would be different "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." Id at 837, 107 S.Ct. at 3148. The *Nollan* Court found an insufficient nexus between the state's asserted interest and the restriction, and thus held that the state had effected a taking for which compensation was due. Id.

We interpret *Nollan* as holding that in cases brought under the takings clause we must undertake a close analysis of the means of protecting the asserted governmental

interest. Here, the city aims to "safeguard tenants from excessive rent increases," and the "concomitant hardships and displacements." LAMC § 151.01. Apparently this is accomplished by *rent* control, which prevents landlords from from arbitrarily raising rents to a level existing tenants cannot afford. The *vacancy* control is apparently intended to prevent the landlord from raising the rent between tenants. See 740 F.Supp. at 780.

But vacancy control does not help incoming tenants in the case of mobile homes. The coach buyer will pay the *same* effective rent for the pad whether or not the landlord is permitted to raise the rent at vacancy. To the potential buyer, the total product—housing—is the relevant cost; how that cost is allocated between rent for the pad and mortgage payments on the coach is largely irrelevant. For example, a buyer who can afford to spend $1000 each month on housing is indifferent between a coach with a $500 mortgage payment on a $500 pad, and one with an $800 payment on a $200 pad.[5] The record here establishes that the buyer considering a coach in the rent-controlled park will be required to pay much more for it than if he bought the coach in a non-rent-controlled park. 740 F.Supp. at 776; see also Hirsch & Hirsch, 35 UCLA L.Rev. at 432 & Table III. The amount more will equal the capitalized monthly savings in rent, adjusted to account for the time value of money. Thus the vacancy-control premium that represents the property right transferred from landlord to tenant is equal to the present value of the difference between the controlled rent and the market rent. The vacancy control ordinance does nothing to protect mobile home buyers from the rigors of the marketplace. Instead it transfers the value of rent-controlled space—$20,880 per pad—from the mobile park landlord to the tenant. We are unable to see how this transfer of wealth from one group

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[5] Income tax laws affect the figures slightly, but do not alter the analysis.

to citizens to another can serve any rational governmental purpose.

Nevertheless, the ordinance does protect *existing* tenants from being forced to sell the coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach. See 740 F.Supp. at 780 ("Based on testimony from mobile home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rent to a level that prospective buyers could not afford."). The correctness of the city's decision to insure coach owners against unscrupulous landlords in this way is a legislative question, not a judicial one. "[The Supreme] Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Loretto*, 458 U.S. at 440, 102 S.Ct. at 3178. Because the vacancy control provision serves the same governmental purpose—protecting incumband tenants—as the RSO, we cannot say that it is unconstitutional. Unlike the city's other rationales, this one falls within the traditional police power and thus there is a sufficient nexus between the challenged provision and a legitimate justification. See *Nollan*, 483 U.S. at 837, 107 S.Ct. at 3148.

C. The third question *Hall* directs us to answer is whether just compensation has been paid. Just compensation requires payment of the full monetary equivalent of he property taken. *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970). The rent Azul Pacifico receives from its tenants only covers the use of the land during the rental period; it has received no compensation for the property right transferred by operation of the RSO. It is the absence of such compensation that puts the regulation here in conflict with the Fifth and Fourteenth Amendments. *Hall*, 833 F.2d at 1281; see Hirsch & Hirsch, 35 UCLA L.Rev. at 459-60.

III

Because we affirm the district court's carefully reasoned conclusion that the Los Angeles ordinance operates to take Azul Pacifico's property without just compensation, we must determine what amount of compensation is constitutionally required.

A. The property right taken by the city's vacancy control ordinance is the right to occupy indefinitely the space in the mobile home park at below-market rent. Thus, the government action is a permanent physical taking for which Azul Pacifico must receive the full monetary equivalent as compensation. *Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179.[6] In takings cases, "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 (1910). The owner's loss is usually measured by the extent to which the taking deprived him of an interest in his property. *United States v. General Motors Corp.*, 323 U.S. 373, 379, 65 S.Ct. 357, 360, 89 L.Ed. 311 (1945). Compensation for a physical taking is measured by the value of the property right at the time of the taking. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 2191, 81 L.Ed.2d 1 (1984).

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[6] The possibility that the statute might later be repealed does not convert the physical occupation into a temporary taking. See *Hall*, 833 F.2d at 1277 ("A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim."). But until the government takes permanent possession and agrees to pay compensation, it may discontinue its efforts. See *First English*, 482 U.S. at 317, 107 S.Ct. at 2387 ("The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations."). Although *First English* involved a regulatory taking, its rationale applies equally to physical occupation cases; indeed, its holding was derived by analogy from previous physical occupation cases. See id at 318, 107 S.Ct. at 2387. Should the city repeal the RSO before the judgment becomes final in this case, the district court would be required to calculate compensation to reflect a temporary rather than a permanent taking.

The district court held that a taking occurred each time a coach was sold, as each sale resulted in the transfer of an economic premium from park owner to tenant. The district court found 48 coach sales during the one-year period prior to the filing of the complaint and, based on its finding that the average premium was $20,880, awarded Azul Pacifico $1,002,240.[7]

The district court's approach reflects a misunderstanding of the theory of compensation applicable in cases such as these. The taking here occurred when the Los Angeles vacancy control ordinance was passed, not at the time of sale of the coaches. *United States v. Dow*, 357 U.S. 17, 22, 78 S.Ct. 1039, 1044, 2 L.Ed.2d 1109 (1958); *De Anza*, 936 F.2d at 1085. The ordinance assigned to all of the tenants then on the property the right to capture the full discounted value of occupying indefinitely Azul Pacifico's property at below-market rent. Because the ordinance transferred a marketable right to every mobile home owner in Azul Pacifico's park at the time it went into effect—whether or not a coach is ever sold—subsequent coach sales by tenants are irrelevant to the question of how much was taken from the landlord.[8]

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[7] The district court treated Azul Pacifico's claim as arising under section 1983, for which the applicable statute of limitations is one year. See Section IV.A. The district court relied on the continuing wrong theory, reasoning that Azul Pacifico was injured each time a coach in its park was sold. See *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). "Under the continuing wrong theory, although the statute of limitations is tolled as to the cause of action, damages are limited by the state statute of limitations." 740 F.Supp. at 779 (citing *Jackson v. City of Charlottesville*, 659 F.Supp. 470, 475 (W.D.Va.1987)). We have since rejected the continuing wrong theory for *Hall*-type takings cases. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir.1991). Because the taking occurred when the ordinance was passed, see id, the statute of limitations affects only the time for bringing the action, not the amount of compensation.

[8] The number of coaches sold might be relevant to ensure a suffi-

The property right need not be monetized to effect a taking; all that's necessary under *Hall* is that the tenant be given an interest that is capable of being turned into cash. *Hall*, 833 F.2d at 1276; cf. *Nollan*, 483 U.S. at 832, 107 S.Ct. at 3146 (the continuing possibility of exercising an easement across plaintiff's land constitutes a permanent taking). In *Hall* the plaintiffs could claim compensation for the transfer of the property right to "each of their 71 tenants," regardless of whether the interest was actually sold. 833 F.2d at 1276. Similarly, in *Loretto*, the taking occurred when the owner was stripped of her right to use the space reserved for cable boxes, regardless of whether the cables were ever installed. 458 U.S. at 436, 102 S.Ct. at 3176. Compensation becomes due all at once, or not at all. The district court here found compensation was due; it must be paid for every occupied mobile home space covered by the RSO at the time of the vacancy control provision's passage in May 1982.

B. The district court calculated damages by measuring the difference between the selling prices of coaches in vacancy-controlled parks and similar coaches in nonvacancy-controlled parks, and arrived at a value of $20,880.00 per coach sold.[9] This represents the average permium

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ciently large sample size for the per-coach premium to accurately measure the value of the underlying property right, but there would be a taking even if, for some reason, *no* coaches were sold following passage of the ordinance.

[9] The city argues that the proper measure is the reduction in the market value of the mobile home park as a whole. the district court was entitled, however, to determine the market value of the park by aggregating the market values of all of the pads; the two figures are equivalent. Amici for the city criticize the district court's techniques for figuring the amount of the premium transferred, largely because its measurements were based on the much-maligned Kelly Blue Book for mobile home prices. We have previously approved of the use of the Kelly Blue Book as a measure of mobile home values for purposes of determining the premium charged on sale, however, *Hall*, 833 F.2d at 1274 n. 5. We see no basis for holding that the district court was not entitled to rely on the Kelly Blue Book in the making its findings.

charged on the sale of coaches in Azul Pacifico's park during the year preceding the bringing of this action.

The district court got it exactly right in using the premium created by the ordinance for the sale of coaches in Azul Pacifico's park as a measure of the value of the property right transferred from the park owner to the coach owners at the time of the taking. The premium charged for the sale of an on-site coach subject to rent control represents the tenant's right to occupy the mobile home pad at below-market rates for the expected duration of the ordinance. Thus, the premium equals the capitalized value of both the use value (foregone rents) and the possessory interest (the right to exclude). Cf. *United States v. Petty Motor Co.*, 327 U.S. 372, 378, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) (noting that use and posession can be two separate property rights). The price of the premium reflects the value the tenant gains from the right to occupy the space and the period of time he can expect to possess this right.

Although we approve the district court's methodology in determining the level of compensation, we disagree with the period it chose as a benchmark. The taking occurred when the Los Angeles vacancy control ordinance went into effect in May 1982; compensation must be calculated from that date. *De Anza*, 936 F.2d at 1085. The district court instead looked to the period May 1986 to April 1987—the one year preceding the bringing of the lawsuit.

The premiums charged on coach sales in 1986-87 certainly *could* reflect the value of the property right transferred when he ordinance took effect. But these premiums might have to be adjusted to reflect the situation in 1982, insofar as the market may have been different then than it was five years later. See *Kirby Forest Industries*, 467 U.S. at 17-18, 104 S.Ct. a 2197-2198 (noting that markets fluctuate unevenly over time). We therefore remand to the district court to calculate the compensation due for a per-

manent taking by multiplying the number of coaches in the park when the ordinance became effective by the value of the vacancy-control premium created *at that time*.

IV

A. In *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that federal courts are to apply state personal injury statutes of limitations for claims brought under 42 U.S.C. § 1983. In California, that period is one year. Cal.Code Civ.Pro. § 340. Because we had earlier applied a three-year limitations period to section 1983 claims (see *Smith v. Cremins*, 308 F.2d 187, 189-90 (9th Cir.1962)), we limit the filing of actions which predate *Wilson* to "either three years from the time the cause of action arises or one year from *Wilson*, depending on which period expires first." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987).

The limitations period for takings claims brought under section 1983 begins to run the date the challenged ordinance is enacted. *De Anza*, 936 F.2d at 1085. The original vacancy control provision was enacted in May 1982; *Wilson* was decided in April 1985. Under *Usher*, therefore, Azul Pacifico had at the latest until May 1985 to file a section 1983 claim;[10] it did not file, however, until April 1987. Its section 1983 claim is therefore barred by the statute of limitations.

B. Azul Pacifico also stated a claim directly under the takings clause of the Constitution.[11] The Fifth Amendment

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[10] The ordinance was amended in June 1984, but the taking occurred when the property right was transferred from landlord to tenant, which was at the first imposition of vacancy control. *De Anza*, 936 F.2d at 1086-87.

[11] In its complaint, Azul Pacifico alleged that enforcement of the RSO "constitutes a taking of property . . . in violation of the Fifth and Fourteenth Amendments to the United States Constitution *and* a deprivation of civil rights [under section 1983]" (emphasis added).

provides that "private property [shall not] be taken for public use, without just compensation."[12] Azul Pacifico claims that the Los Angeles RSO operates to take its property for public use, and this suit is to recover compensation for that taking. In such cases, the Supreme Court has long held that "[t]he Constitution has declared that just compensation shall be paid." *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 327, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893). The Fifth Amendment is self-executing. *Kirby Forest Industries*, 467 U.S. at 5 & n. 6, 104 S.Ct. at 2191 & n. 6; *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980). When the government takes private property, it must pay just compensation to the owner. *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 142 (1933). If the government fails to do so, the property owner may bring suit under the takings clause to compel payment. Id; *Causby*, 328 U.S. at 261-62, 267. This is equally true of an action against a state subdivision. See *Cassettari v. County of Nevada*, 824 F.2d 735, 737-38 (9th Cir.1987); *Ocean Acres L.P. v. Dare County Bd. of Health*, 514 F.Supp. 1117, 1120 (E.D.N.C.1981), affirmed, 707 F.2d 103 (4th Cir.1983). The Constitution itself provides both the cause of action and the remedy. *Jacobs*, 290 U.S. at 16, 54 S.Ct. at 27; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654-55, 101 S.Ct. 1287, 1305-06, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting); see also *Dickinson*, 331 U.S. at 748, 67 S.Ct. at 1384.[13]

If there was any doubt on this score it was removed by the Supreme Court in *First English*. Rejecting the Sol-

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[12] The takings clause is made applicable to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-41, 17 S.Ct. 581, 584-86, 41 L.Ed. 979 (1897).

[13] Federal courts have jurisdiction because the claim is founded upon the Constitution. *Jabobs*, 290 U.S. at 16, 54 S.Ct. at 27; *Causby*, 328 U.S. at 267, 66 S.Ct. at 1068; 28 U.S.C. § 1331.

icitor General's argument that "the [Fifth] Amendment is . . . not a remedial provision," the court stated:

> The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

482 U.S. at 316 n. 9, 107 S.Ct. at 2386 n. 9 (citations omitted); see also id at 316, 107 S.Ct. at 2386 ("in the event of a taking, the compensation remedy is required by the Constitution").

Although the Constitution gives Azul Pacifico a right of action, it does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations. See *Wilson*, 471 U.S. at 266-67 & N. 12, 105 S.Ct. at 1941-42 & n. 12; *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704, 86 S.Ct. 1107, 1112, 16 L.Ed.2d 192 (1966) ("Since [1895], state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question.")[14] Azul Pacifico's claim is for "inverse condemnation," which is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Clarke*, 445 U.S. at 257, 100 S.Ct. at 1130.[15] Azul Pacifico alleges just that: The city has taken its property through the RSO, but has

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[14] The question of characterization—of what state remedy is most analogous—is one of federal law. *Wilson*, 471 U.S. at 268-71, 105 S.Ct. at 1942-44.

[15] The action is "inverse" because it is brought by the condemnee rather than the condemnor. Id.

not condemned it. In California, the statute of limitations for inverse condemnation proceedings is five years. Cal.Code Civ.Pro. § 322 (five-year statute of limitations for adverse possession claims); *Frustuck v. City of Fairfax*, 212 Cal.App.2d 345, 374, 28 Cal.Rptr. 357 (1963) (adopting adverse possession limitations period for inverse condemnation actions).

Courts will not adopt state limitations periods if doing so would contravene the governing federal policy. See *Wilson*, 471 U.S. at 266-67, 105 S.Ct. at 1941-42. Because Azul Pacifico's claim is brought directly under the Constitution to secure rights guaranteed by the Fifth Amendment, varying state statutes of limitations may thwart the federal interest in uniform treatment of takings cases. Cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) (rejecting state-borrowing rule for Rule 10b-5 actions). The most analogous federal statute of limitations—the provision of the Tucker Act which applies to inverse condemnation claims against the United States—is six years. 28 U.S.C. § 2401.

Here, the challenged ordinance was enacted in May 1982 and the complaint was filed in April 1987—within both the six-year federal period and the five-year state period. Because the action was timely under either theory, we leave for another case the question of whether the state or federal limitations period applies.

V

The district court awarded Azul Pacifico damages *and* enjoined enforcement of the ordinance. This was error. The Fifth Amendment by its terms provides for just compensation in the event of a taking. It does not, however, *prohibit* governmental taking—it only requires that when a taking does occur the government pay for it. See *First English*, 482 U.S. at 314, 107 S.Ct. at 2385. We need not

consider whether district courts may enjoin governmental action to avoid a taking; here the vacancy control provision took plaintiff's property when enacted and the city must pay just compensation. No injunction is authorized by the Constitution in this case. Furthermore, the district court's approach overcompensates Azul Pacifico for the permanent taking of its property, while the injunction effectively returns to it the very same property. We therefore vacate the district court's injunction.

VI

Azul Pacifico appeals the district court's refusal to award expert witness fees under 42 U.S.C. § 1988, which allows recover of attorneys' fees in section 1983 actions. Because the section 1983 action is barred by the statute of limitations, Azul Pacifico has no right to recover experts' fees under section 1988. For the same reason, the district court's award of attorneys' fees to Azul Pacifico pursuant to section 1988 is reversed.

Conclusion

The right of the tenant to transfer the property right created by the vacancy control provision distinguishes the physical occupations in this case and in *Hall* from rent control regulations that do not effect a taking. Unlike other types of rent control, mobile home vacancy control permits the outgoing tenant to preserve the benefits of rent control even after he no longer is renting. *Hall*, 833 F.2d at 1279. It is this ability of the tenants to monetize their rights that transforms the state's traditional power to regulate landlord-tenant relationships through rent control into a physical taking requiring compensation under the Fifth Amendment.

The city may choose to create such a windfall for current coach owners. If it does so, however, it must spread the burden on all its citizens, not target one small class

of individuals to foot the bill. See *Nollan*, 483 U.S. at 841, 107 S.Ct. at 3150. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English*, 482 U.S. at 318-19, 107 S.Ct. at 2388 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). The district court properly found that the RSO took Azul Pacifico's property; we remand for a redetermination of damages. We vacate the district court's injunction, however, as a remedy in conflict with the compensation award.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED for further proceedings consistent with this opinion. The panel will retain jurisdiction over any future proceedings. Each party shall bear its own costs on appeal.

APPENDIX B

United States Court Of Appeals
For The Ninth Circuit

No. 90-55853

D.C. No. CV-87-02287-LEW

AZUL-PACIFICO, INC.,
Plaintiff-Appellee,

v.

CITY OF LOS ANGELES,
Defendant-Appellant.

No. 90-56066

AZUL-PACIFICO, INC.,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES.
Defendant-Appellee.

Filed July 23, 1992

Partial Concurrence, Partial Dissent by Judge Kozinski

Before: Cecil F. Poole, Alex Kozinski and Edward Leavy, Circuit Judges.

ORDER

The panel has voted unanimously to grant the petition for rehearing. Accordingly, the petition for rehearing is

GRANTED and the opinion filed November 1, 1991 and reported at 948 F.2d 575 is WITHDRAWN.

Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983. *See, e.g., Bretz v. Kelman*, 722 F.2d 503 (9th Cir. 1983), *vacated on other grounds*, 773 F.2d 1026 (1985) (en banc); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981). *Cf. Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978). *See also, e.g., Thomas v. Shipka*, 818 F.2d 496 (6th Cir. 1987); *Hunt v. Robeson County Dept. of Social Serv.*, 816 F.2d 150 (4th Cir. 1987); *Morrison v. Metropolitan Area Transit Auth.*, 702 F.2d 1037 (D.C. Cir. 1983); *Beineman v. City of Chicago*, 662 F. Supp. 1297 (N.D. Ill. 1987), *appeal dismissed*, 838 F.2d 962 (7th Cir. 1988). Section 1983 was available to Azul, but plaintiff failed to file its complaint within the applicable limitations period.

Even were we to allow Azul to pursue such a "direct Constitutional claim it would also be barred by the statute of limitations. The cause of action accrued when the ordinance at issue here was enacted. *De Anza Properties X Ltd. v. Santa Cruz County*, 936 F.2d 1084, 1085 (9th Cir. 1991). Azul should have filed its complaint within three years of the May 1982 date of enactment or within one year of the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). *See Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The limitations period under those alternatives expired in May 1985.[1] Azul did not file its complaint until April 1987.

Accordingly, the judgment of the district court is VACATED and this appeal is DISMISSED because the federal courts do not have subject matter jurisdiction over Azul's complaint.

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[1] *Wilson* was decided in April 1985.

KOZINSKI, Circuit Judge, concurring and dissenting.

I agree that the petition for rehearing must be granted in light of *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), and *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842 (June 29, 1992). But I cannot agree with the majority's conclusion that Azul's cause of action is necessarily extinguished by *De Anza Properties X., Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991). *Yee* not only overruled *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), upon which our opinion in this case was based; it implicitly overruled *De Anza*, which was premised upon the physical taking theory of *Hall*. *See De Anza*, 936 F.2d at 1086-87. *De Anza* is simply no longer good law for determining when a cause of action accrues for a takings claim. Thus, I would remand to the district court for determination of the statute of limitations issue in light of the intervening *Yee* and *Lucas* decisions, and the resultant obsoleteness of *De Anza*.

APPENDIX C

United States District Court,
Central District California.

No. 87-2287-LEW
740 F. Supp. 772

AZUL PACIFICO, INC., a California corporation,
Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

May 31, 1990.

MEMORANDUM OF DECISION

LAUGHLIN E. WATERS, Senior District Judge.

This case came on for trial before the Honorable Laughlin E. Waters, Senior United States District Judge on January 11, 1990, Sherman Stacey appeared on behalf of the plaintiff; Gwendolyn R. Poindexter, Deputy City Attorney appeared on behalf of the defendant.

FACTS

A. The Challenged Provision of the City's Rent Control Ordinance.

Plaintiff is a family owned and controlled corporation which has the Tahitian Terrace Mobile Home Park as its principal asset. Plaintiff built the mobile home park in 1961 and has operated it continuously to the present. Tahitian

Terrace is located in the City of Los Angeles in the Pacific Palisades community, a prestigious residential community where single family homes have sold from four hundred thousand to four million dollars. Tahitian Terrace is located on Pacific Coast Highway across from a state beach and many of the mobile homes in the park have ocean views.

In August 1978, the City of Los Angeles began to institute a rent control plan applicable to mobile home parks. The program began with a rent freeze and rollback of recently imposed rent increases followed by the adoption of Chapter XV, Article 1 of the Los Angeles Municipal Code, a rent stabilization ordinance (the "RSO"). City of Los Angeles Ordinance No. 152,120, effective May 1, 1979. This ordinance was altered in 1982 by Los Angeles Ordinance No. 156,597 § 9 which added new subsection 151.060.5 to the RSO. This new subsection was an exception to the provision permitting "vacancy decontrol." Vacancy decontrol requires a landlord to charge controlled rents to the current tenant but allows an increase to market rent when the tenant vacates the property. The new subsection prohibited a landlord from raising the rent level on a mobile home "pad" when the mobile home located upon the pad was vacated. Subsection 151.060.5 was repealed in 1984 by Los Angeles City Ordinance No. 158,891 § 3 which adopted a new section 151.06F. Subsection 151.06F, currently in effect, permits only one yearly rent increase and limits a rent increase upon vacancy of a mobile home to the highest rent charged for a comparable site located elsewhere in the park or ten percent, whichever is lower. It is this provision of the Los Angeles rent control ordinance that the plaintiff seeks to have declared an unconstitutional taking. In addition, the plaintiff has asked that the City be permanently enjoined from enforcing the vacancy control provision, and for damages for the alleged loss to the plaintiff caused by the ordinance. The plaintiff's claim is brought under 42 U.S.C. § 1983 and

the fifth and fourteenth amendments to the United States Constitution.

B. Factual and Legal Background of Mobile Home Park Rentals in Los Angeles.

At this stage of the industry, the term "mobile" home is a misnomer. Modern mobile homes are not easily transportable from one location to another. Mobile homes are manufactured in one, two, three or more parts. In general, temporary axles and wheels are fastened to the mobile home sections which are transported by trailer to a mobile home park where the sections are aligned, bolted, sealed, roofed, carpeted, wired, and plumbed. The cost of moving a mobile home can range from three to ten thousand dollars. In general, mobile home tenants tend to remain in the same park for many years and are a quite stable population of renters.[1] At Tahitian Terrace, for example, the average mobile home is sold once every thirteen years. Age may be a factor in the stability of the mobile home park population. In California, the average age of a mobile home park tenant is sixty-seven. Because of their age, the City's expert Prof. Sheehan testified that mobile home tenants are more likely to live on fixed incomes. Moreover, forty-three percent of the mobile home households in the City of Los Angeles are headed by women, according to the 1984 Hamilton, Rabinovitz Rental Housing Study.

There is a shortage of low cost housing in the City of Los Angeles, including mobile home rental space. The shortage of rental space has historically led to abuses of mobile home park tenants by landlords. For example, when

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[1] The 1984 Hamilton, Rabinovitz Rental Housing Study prepared for the City revealed that for eighty percent of all mobile home residents in Los Angeles their current mobile home park space is the first they have ever rented. In California, only three percent of mobile home coaches have been moved from the site of their first installation. Hirsh, "An Inquiry Into Effects of Mobile Home Park Control," 24 *Journal of Urban Economics* 24 (1988).

park owners had the ability to evict tenants without cause, they were able to force a tenant to sell her mobile home to the owner at a fraction of its worth because the tenant had no place to which she could move her home. Sometimes landlords forced tenants to sell only to park owners, maintaining artificially low selling prices. In the past, park owners who were also mobile home retailers would promise buyers a space in the owner's park if they bought a home from him. Once the mobile home was sold, the park owner would evict an existing tenant and install the new one, and then repeat the process over again, ousting old tenants for new.

In 1978 the State of California enacted a Mobilehome Residency Law, Cal.Civ.Code §§ 798-798.86 (West 1982), which curbed some of these abuses. Under the Mobilehome Residency Law, for example, a landlord must execute a written rental agreement with a tenant. Cal.Civ.Code § 798.15 (West 1982). A landlord may not terminate a tenancy nor refuse to renew a tenancy except for cause. Cal.Civ.Code § 798.55 (West 1982). In addition, a landlord may no longer require a mobile home to be removed from his park upon sale of the home to a third person.

Against this state law background, the Los Angeles Rent Stabilization Ordinance provides further protection to tenants in the City's tight housing market. The Los Angeles RSO contains one section listing nine reasons for which a landlord may evict a tenant for cause. Los Angeles Municipal Code § 151.09. The RSO provides for periodic rent increase which are tied to the Consumer Price Index. Los Angeles Municipal Code § 151.06D. In addition, the RSO provides,

> If the site is voluntarily vacated by all the tenants as a result of a sale of the mobilehome (sic), and the mobilehome is not removed from the site, then the maximum rent or maximum adjusted rent may be increased by an amount not to exceed the rent on

> any existing comparable site in the park, or ten percent (10%), whichever is the lower.

Los Angeles Municipal Code § 151.06F.2. It is this ten percent cap which the plaintiff challenges.

DISCUSSION

A. Application of the Hall Analysis.

The parties agree that this case is controlled by the Ninth Circuit decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986) *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988). The plaintiffs in *Hall* were owners of a mobile home park subject to a rent control ordinance enacted by the City of Santa Barbara. Under the ordinance, mobile home park landlords were required to grant tenants leases of unlimited duration. The plaintiffs in *Hall* argued that the ordinance was a taking of their property. They argued that,

> by giving tenants the right to a perpetual lease at a below-market rate, the ordinance transfers to each of them a possessory interest in the land on which their mobile home is located. According to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling far above blue book value. They claim that the substantial premium paid for mobile homes in parks subject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy mobile home parks at below-market rates.

833 F.2d at 1274. The *Hall* court agreed with the plaintiffs. The court classified the *Hall* facts as stating a claim for a "physical occupation" taking of plaintiffs' property under *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S.

419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1988). *Hall* requires a three-part analysis: 1) whether the governmental action amounted to a taking of property; 2) whether it advanced a legitimate governmental interest; and 3) whether there was just compensation. If this Court finds a taking and that there was either no legitimate governmental interest or no just compensation, the plaintiff will prevail.

1. Was There a Taking?

The *Hall* court found that Santa Barbara rent control ordinance effected a physical occupation taking of the plaintiffs' property because it transferred a property right from the landlord to the tenant. In that case, the property right was the right to occupy in perpetuity the land on which their mobile home was located while paying less than its market worth in rent, which right was transferable, had a market value and a market. This Court finds all these elements to be present in this case and accordingly finds that the Los Angeles RSO effects a physical occupation taking of the plaintiff's property.

Unlike the ordinance challenged in *Hall,* the Los Angeles RSO does not specifically require the landlord to grant the tenant a lease of unlimited duration. The plaintiff argues, however, that the combination of the RSO provision prohibiting a landlord from evicting a tenant except for cause and the state Mobilehome Residency Law is the functional equivalent of a lease of indefinite term. *See* Los Angeles Municipal Code § 151.09; Cal.Civ.Code § 798-798.86 (West 1982). This Court agrees that even though the RSO does not by its own terms require a lease of indefinite duration, the practical result of the RSO against the background of state law is just that. For example, under the RSO, a landlord may evict a subtenant in possession of the mobile home at the end of the lease if the subtenant was not "approved" by the landlord. Los Angeles Municipal Code § 151.09(A)(7). However, under state law the landlord may exercise approval rights only if he

reserved them in the original lease, and then only if the subtenant cannot pay the rent when due. Cal.Civ.Code § 798.74 (West 1982). Another example of the combined effect of the state and municipal laws involves the provision of the RSO which authorizes the landlord to evict a tenant if the tenant refuses to renew a tenancy under the same terms as the prior tenancy. Los Angeles Municipal Code § 151.09(A)(5). The RSO itself does not require the landlord to offer to renew the tenancy, only that if the landlord does so and the tenant refuses the offer, the landlord may evict. Under state law, however, the landlord *must* offer to renew a tenancy. Cal.Civ.Code § 798.55(b) (West 1982). Again this has the effect of obligating the landlord to offer a lease of indefinite term.

The City argues that it is not the RSO, but the state Mobilehome Residency Law which forces a landlord to offer a tenant a lease of indefinite term, therefore this Court cannot find the ordinance to be unconstitutional. The City made this argument during pretrial motion practice and it is no more convincing to this Court now than it was then. In this Court's Memorandum of Decision Re: Defendant's Motion to Dismiss, filed December 2, 1987, this Court wrote,

> [t]he Los Angeles rent control ordinance does not operate in a vacuum. Presumably the drafters of the ordinance knew of the state statute when the ordinance was enacted. The combination of the ordinance and the state statute, as alleged in the complaint, cause the effect articulated in *Hall,* specifically that the limitation on rents under the ordinance allows a tenant to sell a mobilehome at a premium.

Municipal ordinances are subordinate to state statutes and to the extent they conflict with state statutes, they are invalid. Sutherland, *Stat. Const.* § 30.01 (4th Ed.). However, there is a presumption that state and municipal laws regulating the same conduct can oeprate harmoni-

ously. *Id.* § 30.05. The Los Angeles RSO and the California Mobilehome Residency Law do not conflict, and there is no evidence to rebut the presumption that they operate harmoniously. Moreover, to adopt the City's position would in effect create a loophole in judicial protection of constitutional rights. Under the City's scheme, states and municipalities could conceivably conspire with one another to enact unconstitutional regulatory schemes, each one enacting laws which are not unconstitutional on their own, but which have an unconstitutional effect in conjunction with one another. If this Court were to adopt the City's argument, it would have no way to protect the individual rights of citizens against the power of the state and its municipal subdivision because neither law could be invalidated as unconstitutional.

Moreover, it is the fact that rents cannot be raised more than ten percent when a tenant sells his mobile home and the buyer remains on the same pad that works the unconstitutional taking under *Hall,* not the state law requiring the landlord to renew a tenancy upon expiration of the original lease. Such a state law may well be constitutional. *See, e.g., Eamiello v. Liberty,* 208 Conn. 620, 546 A.2d 805 (1988), *appeal dismissed, Liberty v. Eamiello,* ___ U.S. ___, 109 S.Ct. 1104, 103 L.Ed.2d 169 (1989). It was only when the RSO created the ability in the tenant to sell his mobile home at a premium that the taking occurs. This ability to transfer the landlords property right to the buyer was created by the RSO, not the state law.

The Los Angeles RSO transfers a property right, the right to occupy in perpetuity a mobile home park pad at reduced rent. Under *Hall,* in order to constitute a taking, that property right must be transferrable, have a market value, and actually be traded in a market. 833 F.2d at 1276. The plaintiff has met its burden proving these three elements in this case. Plaintiff's expert William N. Kinnard, Jr. testified that if a mobile home located and intended to remain on a pad in a rent controlled park sells

for more than a comparable home and pad located in a non-rent controlled park, this is evidence both that the landlord's property right has been transferred from the outgoing tenant to the incoming tenant and that the outgoing tenant was paid for that tranferrable right. Both the plaintiff's expert Robert Foreman and the defendant's expert Robert Lea testified, after accounting for all other variables, that the homes in plaintiff's park sold at prices higher than comparable homes situated in comparable non-rent controlled parks. The plaintiff's expert estimated the value of the premium as no less than $20,800 on average, while the defendant's expert valued the premium at approximately $5,000 per home, an amount he described as "nominal."

Defendant's expert Professor Michael F. Sheehan testified that there are other explanations for the price differentials for sales between mobile homes sold in the plaintiff's park and comparable homes sold in non rent-controlled parks. The City argues that these alternative explanations undermine the plaintiff's proof of the existence of a market for the right to remain in perpetuity at reduced rents in rent-controlled parks. First, Prof. Sheehan testified that the prices reflect the buyers' interest in a regularized rent scheme which prevents arbitrary, extreme jumps in rent, not the fact that the rent levels per se are controlled. Essentially, what Prof. Sheehan characterizes as two interests are simply two ways of saying the same thing. The rent setting process is "regularized" under the rent control ordinance because rents cannot be raised beyond a percentage reflecting the Consumer Price Index, and rent levels are controlled because rents are determined by a regulated scheme. At any rate, the distinction is meaningless under *Hall* which looks for a market for the right to occupy in perpetuity at less than market rent, not necessarily at the same rent level forever. Second, based on the Lea report, his interviews of tenants and the plaintiffs, Prof. Sheehan testified that he does not

believe there is a market for the property right. He found that the majority of tenants were ill informed about rent control and were unable to assign a present value to such a right. He testified that the purchaser's willingness to pay a certain price was based on their wealth and income and the customary price as conveyed to them by their broker. This testimony does not discredit the inference from the sales price differentials that a market for the property right exists. The testimony does not explain why, other than to obtain the right to occupy a pad at a reduced rent, the buyers of homes in the plaintiff's park did not choose to buy cheaper homes in a park where rents were somewhat higher. Moreover, Sheehan's testimony about the buyer's lack of knowledge of economics does not mean that the market does not exist, it merely shifts the knowledge about the value of the property right from the buyers to the brokers, who act as agents of the buyers. Under the test articulated in *Hall,* the Los Angeles rent control ordinance effects a physical occupation taking of the plaintiff's property.

2. Did the Plaintiff Receive Just Compensation?

In determining what constitutes "just compensation," for a takings claim under the fifth and fourteenth amendments, courts generally look to the owner's loss rather than the gain of the entity causing the taking to measure the amount of compensation. *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949). The owner's loss is usually measured by the extent to which the taking deprived him of an interest in his property. *See U.S. v. General Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945). However, courts must look to the individual facts of each case. *See Dore v. United States,* 97 F.Supp. 239, 119 Ct.Cl. 560 (1951); *Yuba Natural Resources, Inc. v. United States,* 821 F.2d 638 (Fed.Cir. 1987). "Just compensation" means the full monetary equivalent of the property taken. *U.S. v. Reynolds,* 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970).

Although the *Hall* court in reversing the district court's dismissal of the plaintiffs' action did not reach the factual issue of just compensation, the opinion does provide some guidance on how to apply the general rules of just compensation to a physical occupation taking in this context.

The *Hall* court rejected the defendant's argument that the plaintiffs were adequately compensated because they were provided a fair return on their investment under the rent control ordinance. The court held that, although this test is used to determine just compensation in regulatory takings cases, this was not the test used in physical occupation takings cases. The court stated in dicta,

> [h]ere the rental payments compensate the Halls for use of the land during the rental period, plus whatever amenities they provide tenants. However, if their claim is substantiated, the Halls are entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants.

833 F.2d at 1281. The City of Los Angeles makes an argument similar to that of the defendant in *Hall*. The City argues that the park owners receive a fair return on their investment under the rent stabilization ordinance. The City also argues that the park owners have received compensation in kind as well. Because the RSO encourages permanency, the City argues, tenants have installed permanent improvements in the park which increase the value of the park and compensate the park owners beyond that provided for under the ordinance. Despite the appeal of these arguments, this Court is bound by the precedent established in *Hall*, according to which only the exact monetary equivalent of the property interest allegedly transferred to the tenants constitutes "just" compensation.

The plaintiff would have damages measured by the difference between rent received and market rent on each mobile home located within its park which has been sold

since the ordinance went into effect. The plaintiff also seeks prospective damages. In support, the plaintiff has provided an extensive market rent analysis of the mobile home park for the years 1982 to 1989, which compares the rent charged at Tahitian Terrace with that charged at comparable parks located in non-rent controlled districts. The City argues that the plaintiff is not entitled to any damages, but agrees to that measure of damages if this Court finds that the plaintiff has been damaged in a constitutional sense by the RSO. The City submitted its own market rent analysis which contains figures that, not surprisingly, lead to a much smaller figure for damages. Moreover, the City adduced evidence that the owners of Tahitian Terrace did not charge the maximum allowed under the ordinance for many years. Therefore, the "rent received" figure provided by the plaintiff would have to be increased to the amount it could have charged legally under the RSO. The City produced an expert witness, James Fleck, to testify to what that amount would have been.

However, the expert testimony of Prof. Sheehan convinces this Court that the measure of damages proposed by the parties is not appropriate under *Hall*. Prof. Sheehan correctly explained the plaintiff's theory of damages as asserting a direct correlation between the gain received by tenants when they sell their mobile home in place and the loss to the landlord. The expert disagreed with the assertion that there is a correlation between the two. Prof. Sheehan testified that the loss to the landlord caused by the RSO should be measured by the lost rental income stream, which is the capitalized value between the rents the landlord could have charged without the RSO and the maximum rents the landlord charged with the RSO. Prof. Sheehan argues that, in an efficient mobile home park market, this loss would be reflected immediately in a lower market value for the *mobile home park*. Prof. Sheehan testified that whether or not the tenant receives a pre-

mium upon the sale of his mobile home is irrelevant to the loss to the landlord caused by the RSO. Prof. Sheehan provided a convincing example: suppose a landlord could charge a monthly market rent of $600.00 on a given pad, but is forced to charge an artificially low price of $500.00 because of the RSO. The landlord loses the capitalized value of $600.00 minus $500.00. If the tenant sells his coach and the landlord raises the rent by ten percent as permitted under the RSO, his loss is reduced. This is because he may now charge $550.00 per month ($500.00 + (10% x $500.00)), so his loss due to the RSO is only the capitalized value of $600.00 minus $550.00. This amount of loss is the same regardless of whether the tenant receives a premium or not upon sale of the mobile home.

The *Hall* opinion makes clear that just compensation in this context must be determined by the amount of the premium the selling tenant gained rather than the loss to the landlord. The *Hall* court stated,

> [t]o make this determination, the court must ascertain the value of the interest allegedly transferred to each tenant and the value of what the Halls received, if anything, in addition to normal rental payments.

833 F.2d at 1281. The *Hall* court, breaking from the traditional "loss" measure of damages for takings cases, requires this Court to look to the windfall gain of the tenants caused by the RSO and award that amount to compensate Azul Pacifico.

The parties have produced adequate evidence of this windfall to enable this Court to render a decision on damages. The plaintiff's expert, Robert Foreman, tesitifed to the amount of this premium. Mr. Foreman compared the sales prices of coach which sold in Tahitian Terrace with the sales prices of identical or nearly identical coaches located in comparable parks, using the Kelly Blue Book

as a standard.[2] Based on this study, the plaintiff's expert determined that the tenants at the plaintiff's park sell their mobile homes for an average of $20,880.00 more than tenants selling similar homes in comparable non-rent controlled parks. The City's expert Robert Lea also testified to the amount of the premium. Mr. Lea used the sales comparison approach to determine a value, if any, of the sales premium. Mr. Lea found a "nominal" difference in the sales prices of mobile homes caused by the RSO, which he valued at $5,000.00 per home.[3] Based upon his interviews with park owners, managers, brokers, and mobile home owners, Mr. Lea formed the opinion that rent control is not one of the primary features considered by mobile home purchasers, but did note that buyers take comfort from the fact that rent levels are stabilized by the City. The plaintiff's witnesses contradict this opinion. For ex-

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[2] Argument was heard at trial about the accuracy and usefulness of the Kelly Blue Book. The Kelly Blue Book is a guide for resale prices of mobile homes, reflecting the national average prices for mobile homes. The City's experts argued that the Kelly Blue Book is a highly inaccurate measure for determining the value of a mobile home. However, this Court has used the Kelly Blue Book not to determine the value of the mobile homes sold in the plaintiff's park, but as a measuring stick to determine the amount of the alleged sales premium caused by the RSO. For example, if a mobile home in the plaintiff's park sells for $10,000.00 over the Kelly Blue Book price, and a mobile home of the same make, model and year located in a comparable, but non-rent controlled park sells for $5,000.00 over the Kelly Blue Book price, this is evidence of a premium of $5,000.00 caused by the rent control ordinance. Adjustments were made by the plaintiff's expert for such factors as park location, view and optional equipment.

[3] This Court does not agree with Mr. Lea's opinion that a $5,000.00 premium per mobile home is a "nominal" amount. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), the leading physical occupation taking case, the burden imposed upon the plaintiff amounted to one and one half cubic feet of cable wire placed upon the plaintiff's building, yet the Supreme Court found a taking, and remanded to the state court for a determination of just compensation. Certainly the taking created by the Los Angeles RSO is not "nominal" compared to the taking in *Loretto*.

ample, one occupant of Tahitian Terrace, Louise Morrison, testified that she bought her mobile home in 1988 for $77,000.00. She then immediately sold the coach for $5,000.00 and purchased a new coach for $39,000.00 which she placed on her lot. From her testimony, it is clear that the right to occupy a rent-controlled lot contributed at least in part to her motivation to pay so much for a coach apparently worth so little.

In its Order Denying Defendant's Motion for Summary Judgment Re: Statute of Limitations dated February 1, 1990, this Court ruled that the continuing wrong theory for the accrual of the statute of limitations applies in this situation where the injury to the plaintiff occurs each time a mobile home located in its park is sold. *See United States v. Dickinson,* 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 91946); *see also Barbaccia v. County of Santa Clara,* 451 F.Supp. 260, 266 (N.D. Cal. 1978). Under the continuing wrong theory, although the statute of limitations is tolled as to the cause of action, damages are limited by the state statute of limitations. *Jackson v. City Council of Charlottesville,* 659 F.Supp. 470, 475 (W.D.Va. 1987) *aff'd in part and vacated in part without opinion,* 840 F.2d 10 (4th Cir. 1988). The applicable California statute of limitations limiting damages in this case is one year. *Usher v. City of Los Angeles,* 828 F.2d 556 (9th Cir. 1987). Therefore, the plaintiff is entitled to recover damages for losses occurring one year prior to the filing of the complaint on April 27, 1987 to the time of trial. Because the plaintiff's loss occurs whenever a mobile home located in its park is sold, damages will be calculated by multiplying the number of coaches sold during that period (48) by the amount of the premium received on the sale (an average of $20,880). The evidence showed a total of forty-eight sales during the applicable period. This Court finds the average premium to be $20,880.00 based on the plaintiff's more comprehensive study.

The plaintiff correctly argues that it need not show that it was deprived of the entire leasehold value of its property by operation of the RSO. While that test for just compensation is utilized in regulatory takings cases, it is not applicable to physical occupation takings. Likewise, the plaintiff is not required under *Hall* to exhaust administrative remedies before bringing its takings claim.

The plaintiff seeks future damages as well for mobile homes that will sell at a premium in the future. This Court agrees with the City that damages for future loss are too speculative because it is impossible to determine how many coaches will both sell and remain in the park in the future. *See Harmsen v. Smith,* 693 F.2d 932, 945 (9th Cir. 1982), *cert. denied,* 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983); *Bergen v. F/V St. Patrick,* 816 F.2d 1345 (9th Cir. 1987).

3. Was There a Legitimate State Interest?

Under *Hall,* if there was a taking and just compensation was not made, it is not necessary for the plaintiff to prove a lack of a legitimate state interest in order for the plaintiff to prevail. 833 F.2d at 1275. In this case, the plaintiff does not argue that there was no legitimate state interest in enacting the Rent Stabilization Ordinance, including the vacancy control provisions. As the Declaration of Purpose of the RSO states,

> There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor.
>
> Tenants displaced as a result of their inability to pay increased rents must relocate but as a result of such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a

> consequence must expend less on other necessities of life.
>
> * * * * * * *
>
> Therefore, it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units.

The legislative history of the RSO makes clear that the vacancy control provision for mobile homes which are sold and intended to remain on the same pad was enacted specifically to protect the substantial investments of tenants in a distorted market where demand far exceeds supply. *See* Report and Recommendation from the Government Operations Committee of the Council of the City of Los Angeles to the City Attorney dated August 9, 1983 (Defendant's Exhibit 292-8). According to the report, vacancy control for mobile homes sold on the pad was enacted "[i]n order to more fairly apportion any economic gains between the mobilehome (sic) park owner and mobilehome unit owner ("tenant") which result from the sale of a mobilehome *which remains on its pad*, while still preventing excessive post-sale rent hikes for mobilehome spaces (pads) which might prevent the sale of the unit . . ." (emphasis in the original). Based on testimony from mobile home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rent to a level that prospective buyers could not afford.

The Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 770, 88 S.Ct. 1344, 1361, 20 L.Ed.2d 312 (1968). Included in this is the protection of tenants and their standard of living. *See Bowles v. Willingham*, 321 U.S. 503, 513, 64 S.Ct. 641, 646, 88 L.Ed. 892 (1944) *cited in*

Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). In *Pennell,* the Supreme Court found the City of San Jose's rent control ordinance was not "facially invalid" under the due process and equal protection clauses. *Pennell* reiterated a long line of Supreme Court precedent which approves government interference in a market where prices are inflated because of a monopoly or near monopoly. *See e.g., FCC v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987); *Block v. Hirsh,* 256 U.S. 135, 156, 41 S.Ct. 458, 459, 65 L.Ed. 865 (1921) (approving rent control in Washington, D.C., on the basis of Congress' finding that the housing market there was monopolized).

The *Pennell* court also rejected the argument of some *amici* that rent control is a per se taking. 108 S.Ct. at 587, n. 6. Rent control has long been held constitutional as a legitimate exercise of the state's police power. Citing *Loretto,* the Court wrote, "we have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " *Id.* The Court in *Loretto* wrote that the *Loretto* decision itself would not have "dire consequences for the government's power to adjust landlord-tenant relationships . . . . (because) [i]n none of these cases . . . did the government authorize permanent occupation of the landlord's property by a third party" (referring to the long string of Supreme Court precedent upholding rent control as constitutional) 458 U.S. at 438, 102 S.Ct. at 3177. Unfortunately the Supreme Court apparently did not envision the *Hall* decision in which *Loretto*'s narrow physical occupation holding was expanded to apply to mobile home vacancy control.

Mobile home rent control differs significantly from rent regulation of apartments due to the nature of a mobile home as a significant financial investment for the mobile home park tenant. The City has determined, however, that

these tenants are just as vulnerable and in need of the same types of protection as apartment renters. However, the Ninth Circuit in *Hall,* applying market theory and finding that rent control creates a "physical occupation" taking if it transfers a property right for which there is a "market," a "market value" and actual transfer, has established a precedent that this Court may not ignore. The mobile home market is an example of a monopoly, which is a market *failure,* rather than a market, and is a prime candidate for government regulation, but under *Hall,* this Court must invalidate the vacancy control provision of the City's Rent Stabilization Ordinance as an unconstitutional taking in violation of the fifth and fourteenth amendments. A permanent injunction will issue.

The foregoing constitutes the Court's findings of fact and conclusions of law as prescribed by Rule 52(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 87-2287-LEW

AZUL PACIFICO, INC., a California corporation,
Plaintiff

v.

CITY OF LOS ANGELES, a Municipal corporation,
Defendant

MEMORANDUM OF DECISION RE: DEFENDANT'S MOTION TO DISMISS UNDER F.R. CIV. PROC. RULE 12(b)(6) OR IN THE ALTERNATIVE TO ABSTAIN; OR IN THE ALTERNATIVE A MORE DEFINITE STATEMENT

On July 24, 1987 defendant, the City of Los Angeles, filed a motion to dismiss under F.R.Civ. Proc. 12(b)(6) or in the alterntive abstain; or, in the alternative for a more definite statement in response to a complaint filed by plaintiff, Azul Pacifico on April 10, 1987. This court has considered the papers filed in connection with this motion, the case file, and the arguments set forth at the October 26, 1987 hearing on this matter and finds as follows.

Plaintiff, a mobilehome park operator, alleges in its complaint that the operation and enforcement of a Los Angeles rent control ordinance constitutes a taking of property under the Fifth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. section 1983. Plaintiff also claims deprivation of civil rights under 42 U.S.C. section 1981 and that the ordinance is constitutionally infirm because no emergency exists to justify its imposition.

Plaintiff's complaint seeks damages, declaratory and injunctive relief.

Defendant's motion to dismiss, or in the alternative to abstain; or, in the alternative for a more definite statement as to plaintiff's Fifth and Fourteenth Amendment taking claim and related 42 U.S.C. section 1983 claim is denied. Defendant's motion to dismiss as to plaintiff's 42 U.S.C. section 1981 claims and the claim that the ordinance is unconstitutional because no emergency exists to justify it is granted.

Plaintiff's complaint as set forth facts sufficient to support a taking claim under the Fifth and Fourteenth Amendments to the United States Constitution. This court is presently bound by the decision of *Hall v. Santa Barbara,* 813 F.2d 198 (9th Cir. 1987), *Petition for Cert. filed.* In *Hall* the Ninth Circuit reversed dismissal of a complaint which asserted a similar taking claim. *Hall* breaks the "taking" analysis into three inquiries: (1) Did the governmental action amount to a taking of property? (2) Did it advance a legitimate governmental interest? and (3) Was there just compensation? *Hall* stated that "[i]f the first question is answered in the affirmative and either of the other two in the negative, plaintiffs prevail, otherwise they lose." *Id.* at 202 (citations omitted).

1. Did the governmental action amount to a taking?

As to the first inquiry articulated in *Hall,* this court finds that plaintiff has set forth sufficient facts to sustain a claim that the governmental action amounted to a taking. There are two general lines of Supreme Court authority when determining whether a taking has occurred. The first type is the "regulatory" taking analysis. (*See, e.g., FCC v. Florida Power Co.,* 94 L.Ed 2d 282 (1987); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). *See also,* cases cited in *Hall,* 813 F.2d at 202 n.11 and accompanying text.) The second type is the "physical occupation" taking cases. (*See, e.g., Loretto v. Teleprompter*

Manhattan CATV Corp., 458 U.S. 417 (1982); *See also*, cases cited in *Hall*, 813 F.2d at 202 n.12 and accompanying text).

Physical occupation cases are those where the government physically intrudes on private property or authorizes others to do so. *Hall*, 813 F.2d at 202. *Hall* notes that under the Supreme Court case of *Loretto v. Teleprompter*, " 'a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.' " *Id.* at 203 (citing *Loretto*, 458 U.S. at 432). Even if a physical occupation achieves an important public benefit or has only minimal economic impact on the owner it will be deemed a taking. *Id.*

The *Hall* court found a claim for taking by physical occupation because the rent control ordinance in *Hall*, as it allegedly operated, transferred a possessory interest in plaintiff's land to the tenants. The allegation most troubling to the Ninth Circuit in *Hall* was that the tenant would derive an economic benefit by "capturing a rent control premium when he sells his mobile home." *Id.* at 204-05. *Hall* distinguished the Santa Barbara ordinance with others upheld by the Supreme Court since *Loretto* because, "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." *Id.* at 205. The court held that "[t]his is not a minor difference; it is crucial." *Id.* at 206.

The tenants' possessory interest described in *Hall* included the right to occupy the property in perpetuity. The ordinance required the landlord to give an indefinite lease to the tenants, while the tenants paid only a fraction of the value of the rent. *Id.* at 203. The plaintiffs in *Hall*

further alleged that the landlords' residual rights in the property were "largely at the mercy of his tenants" because the tenant alone decided who the successor would be by selecting a buyer for the rental unit. *Id* at 203-04. The rights which the tenants allegedly derived because of the rent control ordinance indicated a taking by physical occupation.

This court acknowledges that there is a difference between the ordinance in *Hall* and the one in *Azul Pacifico.* The difference is that the ordinance in *Hall* itself required the landlord to give tenants an indefinite lease which could only be broken by the landlord for cause. The ordinance here does not itself require a lease. Defendant argues that it is not the ordinance which gives plaintiff an indefinite estate in land, but, if anything, it is a California State Statute, The California Mobilehome Residency Law, California Civil Code section 798 *et seq.,* which limits a mobilehome park landlord's right to terminate a tenancy and prohibits a landlord from requiring removal of a mobilehome upon sale to a third party. This difference does not justify dismissing the complaint. The Los Angeles rent control ordinance does not operate in a vacuum. Presumably the drafters of the ordinance knew of the state statute when the ordinance was enacted. The combination of the ordinance and the state statute, as alleged in the complaint, cause the effect articulated in *Hall,* specifically that the limitation on rents under the ordinance allows a tenant to sell a mobilehome at a premium. It is the guaranteed low rent plus the right to remain in possession that would encourage a buyer to pay more for a mobilehome in a rent-controlled mobilehome park.

Plaintiff, Azul Pacifico, claims that tenants in its mobilehome park have economically benefitted by the rent control law by selling their mobilehome units at a premium. Plaintiff has stated sufficient facts to support a claim for a physical occupation taking like that described in *Hall.*

There is a United States Supreme Court case, *FCC v. Florida Power Corp.*, 94 L.Ed.2d 282 (1987), decided after *Hall*, which discussed the physical occupation taking analysis. *Id.* at 286 & 289-90. Defendant claims that *FCC* requires that this case be analyzed under the less strict regulatory taking test. Upon a close review of the relevant law, this court must disagree.

FCC involved an Act which limited the amount of rent a power company could charge once it leased a pole to a cable company. The Supreme Court distinguished *Loretto, supra*, in that the FCC Act "[c]learly contemplates voluntary commercial leases rather than forced governmental leasing . . ." *Id.* In *FCC* the Court clarified that *Loretto* applied only where physical occupation was *required* and if not required, the taking claim would be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. *Id.* at 290 (citing *Loretto*, 458 U.S. at 440).

Although the decision in *FCC* clearly cuts back on a broad application of the *Loretto* physical occupation analysis, it does not justify dismissing the complaint here for several reasons. First it is unreasonable to assume a landlord has a true choice to not lease the spaces in the park. The magnitude of potential loss to the landlord here is great when compared to the facts in *FCC*. Terminating the leases here could mean giving up the sole purpose of the landlord's business. This might require giving up a substantial investment and could be extremely impractical. To grant defendant's motion to dismiss based on the *FCC* rationale would be to ignore the reality that plaintiff here may actually have no choice.

Second, and more importantly, this court cannot assume that plaintiff has an absolute right to legally shut down their mobilehome park without government control. A mobilehome park owner must satisfy state and local requirements. This may include notice to tenants or a certain time frame before

a landlord can shut down the operation of the park. In addition, as briefly suggested at the hearing on this motion, the coastal commission presumably has some jurisdiction where the Azul Pacifico Mobilehome Park is concerned. This indicates that unlike the facts in *FCC,* leasing requirements are or may be imposed on mobilehome park owners by the government. Therefore, plaintiff may be able to prove compulsory access to property under the *FCC* standard.

Lastly, Fifth Amendment taking claims are known for requiring a case by case analysis. There are many factors that must be considered. The Supreme Court has itself admitted its inability to develop a 'set formula' for when compensation is due. *Hall,* 813 F.2d at 201 (citing *Penn Central,* 98 S.Ct 2646, 2659). The nature of these claims defies a general rule of law applicable to all cases. The Ninth Circuit in *Hall* focused on the "crucial" fact that tenants allegedly gained an economic benefit from the ordinance. They did not stress the "compulsory access" analysis of *FCC.* This court is not convinced that the factors in *FCC* are the only factors which may be used to find a physical occupation for purposes of the Fifth Amendment taking analysis. In addition, this court is not convinced that the factors in *FCC* are absent here.

2. Did the ordinance substantially advance a legitimate state interest?

It is not necessary, at this stage, to discuss the second inquiry articulated in *Hall* with respect to the taking analysis. This was not suggested as a determinative issue for dismissing the complaint.

3. Was adequate compensation paid?

It is noted here that the third inquiry of whether "adequate compensation was paid", is an inquiry apart from whether a taking has occurred. *Hall,* 813 F.2d 198, 208-09. Therefore, although the rental payments may adequately compensate a plaintiff whose property has been

"taken", the *Hall* court stated that "[adequate compensation] cannot be assumed; it must be proven." *Id.* at 208.

On the same line, defendant's motion to require plaintiff to exhaust administrative remedies is denied. The *Hall* court did not require the plaintiff to exhaust further administrative remedies based on a finding that the administrative remedy for a rent adjustment goes to the issue of just compensation, not whether a taking has occurred. *Id.* at 208 & 208 n.28.

Based on the above discussion, defendant's motion to dismiss plaintiff's Fifth and Fourteenth Amendment taking claim and related 42 U.S.C. section 1983 claim is denied. This court has been informed that a petition for Certiorari is pending in *Hall v. Santa Barbara* before the United States Supreme Court. Therefore, this court awaits further word on this matter if Certiorari is granted.

Plaintiff's second claim is that the Ordinance is constitutionally infirm because "no emergency exists which justifies its imposition on plaintiff and therefore it violates the Fifth and Fourteenth Amendments as well as 42 U.S.C. sections 1981 and 1983." Defendant's motion to dismiss these claims is granted.

Plaintiff suggests the because the United States Supreme Court has never held rent control to be a valid exercise of a state or local police power absent the existence of an emergency, that indicates an emergency is required. As discussed below, plaintiff's argument is not supported by precedent.

Plaintiff cites *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct 458 (1921) as support. In *Block* the Supreme Court upheld a rent control law applied to the District of Columbia which was enacted due to emergency conditions of the war. 41 S.Ct. at 459. *Block* merely said that a "public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." *Id.* It did

not require an emergency to justify any such law. *Block* equated limiting rents with limiting the heights of buildings, "if to answer one need the legislature may limit height to answer another it may limit rent . . . The reasons are of a different nature but they are certainly not less pressing." *Id.* The *Block* court further stated that where there is a short supply of housing, public interest justifies some control and "[t]he only matter that seems open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulation of the present sort pressed to a certain height might amount to a taking without due process of law." *Id.* at 460 (citation omitted). The ultimate question in *Block* rested on whether the law went so far as to effect a taking, not whether such laws require an emergency.

Plaintiff also cites *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 44 S.Ct. 405 (1924), as support. *Chastleton* also dealt with a District of Columbia rent control ordinance. The Court stated that "a law depending upon the existence of an emergency or *other certain state of facts* to uphold it may cease to operate if the emergency ceases or *the facts change* even though valid when passed." 44 S.Ct. at 406 (citations omitted) (emphasis added). At the hearing on this motion, plaintiff's attorney agreed that the language referring to "other facts" in *Chastleton* indicates that the Supreme Court would not require all such laws be justified by an emergency. *Chastleton* happened to be a case where there was a stated emergency justifying the law. However, the holding in *Chastleton* was that the purpose for the law, whether emergency or other state of facts, had to still exist for the continued operation of the law, not that an emergency was the only justification.

The Court of Appeals for the Sixth Circuit shed some light on the current state of affairs when it stated in *Eisen v. Eastman* that "[t]he constitutionality of rent control

legislation seems not to have been directly passed upon by the Supreme Court since the cases arising during World War II and the housing shortage consequent thereon (citations omitted). While in those cases the Court naturally stressed the war and post-war emergencies, we have no doubt that it would sustain the validity of rent control today .... The time when extraordinary exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that *Nebbia v. New York*, 291 U.S. 502, 539 (1934), was decided ..." *Eisen*, 421 F.2d 560 (6th Cir. 1969).

The California Supreme Court has also provided insight on this issue. In *Birkenfeld v. Berkeley*, the California court specifically held that an emergency is not required for rent control to be constitutional. 130 Cal. Rptr. 465, 550 P.2d 1001, 17 Cal. 3d 129, 159 (1976). *Birkenfeld* cited *Nebbia v. New York* for the proposition that " '[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.' " 17 Cal. 3d at 165 (quoting *Nebbia*, 291 U.S. 502, 539); see also, *Eisen*, 421 F.2d at 567. *Birkenfeld* cited *Block v. Hirsh*, *supra*, for the proposition that just like building height restrictions are valid under states' police power, so are rent limits and that to "restrict landlord's to a 'reasonable rent' 'goes little farther than the restrictions put upon the rights of owners of money by the more debatable usury laws.' " 17 Cal. 3d at 159 (quoting *Block*, 265 U.S. at 156-57).

This court agrees with and adopts the view that no emergency is required to justify a rent control ordinance. Therefore, defendant's motion to dismiss as to this claim is granted.

Defendant's motion to dismiss plaintiff's 42 U.S.C. section 1981 claims is also granted. To state a claim under

section 1981 a plaintiff must allege racial discrimination. Plaintiff's counsel confirmed at the October 26th hearing that there is no claim of racial discrimination in this matter.

Defendant requests this court to abstain from jurisdiction until the state court can rule on state law issues which defendant claims would make the constitutional claims unnecessary. The motion to abstain is denied. In *Canton v. Spokane School District,* 498 F.2d 840 (9th Cir. 1974) the court held that for a district court to decline to exercise or postpone jurisdiction is "an extraordinary measure" which generally must include all of the basic elements of the leading case *Railroad Commission of Texas v. Pullman. Id.* at 845 (citing *Pullman,* 312 U.S. 496, 498-99). The three requirements of *Pullman* are essentially that the complaint touches on a sensitive area of social policy; the constitutional adjudication can "plainly be avoided" based on a definitive ruling on the state issue; and the determinative issue of state law is doubtful. *Id.* Defendant does not explain what particular state law can "plainly avoid" the constitutional question. They do not refer to a particular law nor a particular issue that might avoid plaintiff's constitutional claims. This court finds that abstention is inappropriate in this case. To grant defendant's motion to abstain would unjustifiably invite delay rather than to deal with the problems presented. Therefore, the motion to abstain is denied.

IT IS SO ORDERED

DATED: December 1, 1987

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-2287-LEW

AZUL PACIFICO, INC., a
California Corporation,

Plaintiff,

v.

CITY OF LOS ANGELES, a
municipl corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT RE: STATUTE OF LIMITATIONS

The Court, having read and considered the papers submitted in support of and in opposition to the defendant's motion for summary judgment re: statute of limitations, has concluded that the statute of limitations has not run and the plaintiff accordingly is not barred from asserting its cause of action. The continuing wrong theory of the accrual of the statute of limitations applies in this case where the alleged injury to the plaintiff occurs each time a mobile home located in its mobile home park is sold. *See United States v. Dickinson*, 331 U.S. 745, 749 (1946); *see also Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 266 (N.D. Cal. 1978).

IT IS ORDERED, the defendant's motion is denied.

DATED: 1 Feb, 1990 /s/ Laughlin E. Waters
LAUGHLIN E. WATERS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

1. The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

3. 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

4. Los Angeles Municipal Code § 151.06F provides:

"For a rental unit, which is the site within a mobilehome park (hereafter "site") on which a mobilehome is located and is vacated by all the tenants after the operative date of this subsection;

> 1. Except as otherwise provided in this subsection, if the mobilehome on the site is vacated voluntarily or as a result of an eviction or termination of tenancy based on one or more of the grounds described in Section 151.09A1, A2 or A9, and the mobilehome is permanently removed from the site, then the maxi-

mum rent or maximum adjusted rent may be increased to any amount upon the re-rental of the site. Thereafter, as long as the site continues to be rented to one or more of the same persons, no other rent increase shall be imposed pursuant to this subdivision.

However, this subdivision shall not apply in the following circumstances:

a. If the mobilehome has been temporarily removed for repairs; or

b. If the mobilehome has been replaced with a new mobilehome that one or more of the same tenants will occupy.

2. If the site is voluntarily vacated by all the tenants as a result of a sale of the mobilehome, and the mobilehome is not removed from the site, then the maximum rent or maximum adjusted rent may be increased by an amount not to exceed the rent on any existing comparable site in the park, or ten percent (10%), whichever is the lower. A comparable site for the purposes of this subdivision shall be a site within the same park which has a mobilehome located on it which is substantially the same size (single, double or triple wide) as the mobilehome that was sold. Thereafter, as long as the site continues to be rented to one or more of the same persons, no other rent increase shall be imposed pursuant to this subdivision. The rent may only be increased pursuant to this subdivision once in any twelve consecutive month period."

5. California Civil Code § 798.55 provides:

"Legislative findings; Notice of termination by management

(a) The Legislative finds and declares that, because of the high cost of moving mobilehomes, the potential of dam-

age resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner, addressed to the legal owner, each junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code."

6. California Civil Code § 798.56 provides:

Reasons for terminating of tenancy

"A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(d) (1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate the tenancy. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision.

(2) However, if a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within the preceding 12-month

period, no written three-day notice shall be required for a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or he registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) The homeowner shall remain liable for all payments due up until the time the tenancy is vacated.

(5) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(e) Condemnation of the park.

(f) Change of use of the park or any portion thereof, provided:

(l) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use request has been granted.

(4) The notice requirements for termination of tenancy set forth in Sections 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(g) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government Code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (f) of this section."

7. California Civil Code § 798.74 provides:

"Approval of purchaser by management

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies,

he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support. If the ownership or management rejects a purchaser as a prospective homeowner, the ownership or management shall inform the selling homeowner in writing of its reasons for the rejection. If the approval of a purchaser is withheld for any reason other than those stated in this article, the management or owner may be held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section."

No. 92-886

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AZUL PACIFICO, INC.,
Petitioner,
vs.
CITY OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May petitioner separately seek a remedy directly under the Fifth Amendment of the United States Constitution in addition to the remedy provided by 42 U.S.C. § 1983?

2. Should the Court review the issue of the appropriate statute of limitations for a claim pled directly under the Fifth Amendment of the United States Constitution when there is no conflict on this issue in the courts?

3. Is an alleged regulatory taking claim ripe for review before this Court when petitioner has failed to either litigate that claim at trial or exhaust its available administrative and state judicial remedies?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are listed in the caption of the Brief in Opposition presented to this Court.

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No. 92-886

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

AZUL PACIFICO, INC.,
Petitioner,
vs.
CITY OF LOS ANGELES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Los Angeles ("City") respectfully requests that this Court deny petitioner, Azul Pacifico, Inc.'s ("Azul") Petition for Writ of Certiorari seeking review of the decision of the Ninth Circuit Court of Appeal vacating the judgment below. There is a lack of subject matter jurisdiction based on the running of the statute of limitations. Further, the decision below neither conflicts with any of this Court's rulings nor conflicts with other Courts of Appeals. Therefore, this Court need not and should not grant Azul's petition. Moreover, this Court should not grant Azul's petition because Azul did not perfect, properly plead or preserve any underlying claims upon which relief could be granted.

OPINIONS AND ORDERS BELOW

On July 23, 1992, the Ninth Circuit Court of Appeals issued its Order granting rehearing. That Order resulted in the opinion of the Ninth Circuit dated November 1, 1991, being withdrawn and the district court judgment vacated. The July 23, 1992, Order is reported at 973 F.2d 704. See Petitioner's Appendix ("Pet. App.") B, 25a-27a. The November 1, 1991, opinion of the Ninth Circuit is reported at 948 F.2d 575. Pet. App. A, 1a-24a.

On May 31, 1990, the district court filed its Opinion after trial in this matter, which opinion is reported at 740 F.Supp 772. Pet. App. C., 28a-46a.

JURISDICTION

Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 and 1343(3). Jurisdiction in the Ninth Circuit Court of Appeals rested upon 28 U.S.C. § 1291. Jurisdiction before this Court is based upon 28 U.S.C. § 1254(1). Respondent received the Petition for Writ of Certiorari on November 23, 1992, and is timely filing this Brief in Opposition to the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees in substantial part with the statement made by petitioner in this regard, with the exception that the case also involves § 151.00, *et seq.* of the Los Angeles Rent Stabilization Ordinance, a portion of which, § 151.01, is set out verbatim in Respondent's Appendix ("Resp. App.") B attached herein.

STATEMENT OF THE CASE

A. Statement of Facts

Azul is the owner of the Tahitian Terrace Mobile Home Park ("Park"), located in the City of Los Angeles. The residents include senior citizens, many of whom are on fixed incomes. As the landlord of the Park, Azul rents mobilehome sites to its residents, who own the individual homes located in the Park. Despite their misnomer, mobilehomes are not truly mobile, and "in general mobile home tenants tend to remain in the park for many years and are a quite stable population of renters." Pet. App. C., 30a. This is because mobilehomes are expensive to move, and the few available parks to which to move them have very few spaces available. Pet. App. C., 30a. As a result, most coaches remain in mobilehome parks, and persons interested in living in a particular park must purchase a coach in the park to do so.

Like in most California cities, there is a housing shortage in Los Angeles, including a shortage of mobilehome rental space. Pet. App. C., 30a. This shortage of rental space, combined with the relative immobility of coaches, has "historically led to abuses of mobile home park tenants by landlords." Pet. App. C., 30a. These abuses have included charging exorbitant rents and evicting tenants without cause, forcing "a tenant to sell her mobile home to the owner at a fraction of its worth" because there was no available space for the tenant to move the home. Pet. App. C., 31a.

In 1978, California enacted a Mobilehome Residency Law designed, in part, to curb some of these abuses. That law includes protections for mobilehome residents against the termination of a tenancy without cause, Cal.

Civ. Code §§ 798.55 and 798.56, and the forcible removal of a coach from the park upon a sale. Cal. Civ. Code § 798.73. State law also provides that a landlord cannot refuse to accept a new purchaser of a coach as a tenant, except under limited circumstances generally related to that person's ability to pay rent and willingness to follow park rules. Cal. Civ. Code § 798.74. Pet. App. F, 60a-64a.

In 1978, the City of Los Angeles adopted § 151.00, *et seq.* of the Los Angeles Municipal Code, known as the Rent Stabilization Ordinance ("RSO"), which became operative on May 1, 1979. Its purpose was to "regulate rents so as to safeguard tenants from excessive rent increases while at the same time providing landlords with just and reasonable returns from their rental units." Resp. App. B-2.

Generally under the RSO, when a tenant voluntarily vacates a rental or is evicted under certain specified grounds, the landlord may re-rent the rental unit for any amount, after which it becomes subject to the provisions of the RSO. However, because "mobile home rent control differs significantly from rent regulation of apartments due to the nature of a mobile home as a significant financial investment for the mobile home park tenant," the RSO was amended in 1982 to add Subsection C 5 to § 151.06 of the Los Angeles Municipal Code. This provision prohibited park operators from raising rents upon the sale of a mobilehome coach. Pet. App. C., 45a. The RSO was amended again in 1984, repealing Subsection C 5 of § 151.06 and replacing it with Subsection F, which allows park owners to increase rents by 10% upon sale of the mobilehome coach. The constitutionality of the provisions of the RSO as applied to mobilehome parks, including its limitation of rent increases has been upheld by the California courts in *Palos Verdes Shores*

Mobile Estates, Ltd. v. City of Los Angeles, 142 Cal.App.3d 362, 190 Cal.Rptr. 866 (1983).

B. Procedural History

Azul filed its complaint on April 10, 1987, five years after the 1982 amendment to the RSO prohibiting any rent increases upon coach sales, and three years after the 1984 amendment authorized a rent increase up to 10% upon a coach sale. Azul's only complaint about the RSO was that there were limits on how much it could raise the rent upon the sale of the tenant's coach. It objected to the 10% limit and wanted to be able to increase rents to any amount. It wanted to do so irrespective of the impact that excessive rents might have upon the ability of existing tenants to sell their homes. However, Azul was faced with the decision in *Palos Verdes Shores* upholding the constitutionality of the RSO against due process and equal protection challenges.

Basing its complaint on the Ninth Circuit decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den*, 485 U.S. 940 (1988), Azul filed in the federal district court and claimed that the RSO, in conjunction with the California Mobilehome Residency Law, constituted a physical taking of its property. Azul alleged that:

> "The Rent Control Law has had the effect of depriving the Plaintiff of all use and occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff." Resp. App. A-2.

It contended that "the operation and enforcement of the Rent Control Law effects a taking of Plaintiff's property for public use and benefit without payment of just compensation" and "constitutes a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§ 1981 and 1983." [1] Resp. App. A-3.

Azul never alleged a *regulatory taking*. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). It did not allege that the RSO deprived it of all economic use under the standards enunciated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), or that it failed to "substantially advance a legitimate state interest" under *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

At trial, Azul relied exclusively on its claim of permanent physical occupation. It presented evidence solely to support its allegation that the RSO constituted a *physical* taking of property to prove: "(1) that the effect of the Los Angeles Rent Stabilization Ordinance has been and is to deprive Plaintiff of an interest in its land and transfer that interest to Plaintiff's tenants; (2) that Plaintiff's tenants are thereafter able to sell that transferred interest for value, (3) that Plaintiff's tenants do sell that transferred interest for value, (4) that Plaintiff's tenants' sales of such transferred interests occur in an established market, and (5) that Plaintiff's tenants have and do receive windfalls upon the sales of coaches." Plaintiff's Trial Brief at 2.

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[1] Azul's Section 1981 claim was dismissed upon the City's motion to dismiss. Pet. App. D, 55a-56a.

After a three-week court trial, the district court, acknowledging that "[t]he parties agree that this case is controlled by the Ninth Circuit decision in *Hall* . . .," not surprisingly found that the RSO amounted to an unconstitutional *physical* taking.[2] Pet. App. C., 32a. While acknowledging under the three-tier *Hall* test that the provision of the RSO *does* advance a legitimate state interest, the district court believed itself compelled under *Hall* to find that it constituted a physical taking.[3] In fact, the court noted that "the plaintiff does not argue that there was no legitimate state interest in enacting the Rent Stabilization Ordinance, *including the vacancy control provisions*." (Emphasis added.) Pet. App. C., 43a. The district court went to great lengths to explain that under this Court's standard in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), ordinances which regulate landlord and tenant relationships are a valid exercise of the state's police power. Thus, the court found that where the City's goal through "vacancy control" was to "protect the substantial investments of tenants in a distorted market where demand far exceeds supply, the ordinance advances a legitimate governmental objective." Pet. App. C., 44a. Nonetheless, applying *Hall* to the facts before it, the district court felt constrained to invalidate the vacancy control provision. Pet. App. C., 46a. Accordingly, it issued an injunction against the

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[2] *Hall*, which of course has since been overruled by this Court in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), was considered a takings case based on a physical takings theory akin to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), as distinct from a regulatory taking akin to *Penn Central*.

[3] *Hall* provided a three-part test to evaluate a physical takings allegation: 1) does the governmental action constitute a physical taking; 2) does the action advance a legitimate governmental interest; and 3) has just compensation been paid? 833 F.2d at 1274.

City's enforcement of the provision and imposed damages in the amount of $1,002,240.

Addressing the City's statute of limitations argument raised in a summary judgment motion and renewed at trial, the court found that the ordinance worked a "continuing wrong" which occurred each time a mobilehome coach was sold, and thus tolled the statute of limitations as to the cause of action. It acknowledged that the principles of *Wilson v. Garcia*, 471 U.S. 261 (1985) were applicable here to determine the limitations period, but applied *Wilson* to limit recovery of damages, rather than applying it to bar the action. Thus, the district court applied California's personal injury statute of limitations of one year, citing *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987), to limit the recovery of damages to one year prior to the filing of the lawsuit. (The district court drew no distinction between a "direct" cause of action filed under the Fifth Amendment, as opposed to a § 1983 claim, but spoke broadly about the application of the statute of limitations to the case in general.)

The City appealed the judgment. Azul appealed the district court's denial of its application of costs for expert witness fees. It did not appeal the court's ruling that the challenged RSO provision substantially advances a legitimate governmental interest.

On November 1, 1991, the Court of Appeals affirmed the decision below *in part*. In an opinion authored by Judge Alex Kozinski, who also authored *Hall*, the court reasoned that the vacancy control provision worked a physical taking under *Hall*. Pet. App. A, 11a. It also agreed with the district court that the ordinance furthered a legitimate governmental interest. Pet. App. A, 14a. It recognized that the vacancy control provision serves the same governmental purpose as the RSO: protecting

incumbent tenants "from being forced to sell the coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." The court held that "there is a sufficient nexus between the challenged provision and a legitimate justification." Pet. App. A, 14a.

Unlike the district court, however, the Ninth Circuit found that the "continuing wrong" theory was inapplicable to the facts in *Azul* and correctly determined that the cause of action accrued when the challenged ordinance was enacted. Pet. App. C., 19a. It held that the § 1983 action was barred by the statute of limitations by application of the rule of *Wilson v. Garcia*, 471 U.S. 261 (1985).

However, without the benefit of prior briefing on the issue, the court also determined that Azul had pled a "direct" cause of action under the Constitution which was governed by a wholly different statute of limitations.[4]

On November 15, 1991, the City filed its petition for rehearing. Azul filed its response. Both briefs constituted the first time the issue of the availability of a "direct" cause of action under the facts presented here was extensively briefed by the parties.

On July 23, 1992, the Ninth Circuit issued its Order granting the City's petition and withdrawing its earlier opinion.[5] Citing established precedent both in the Ninth Circuit and other circuits across the nation, the Court of Appeal determined that Azul's complaint was indeed

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[4] It also invalidated the injunction as being an inconsistent remedy under the just compensation provision of the Constitution and remanded the case for a different calculation of damages.

[5] In the interim, this Court decided *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), which overruled *Hall*.

barred by the statute of limitations. It determined that there is no cause of action directly under the Constitution in this instance since Azul had an available remedy under § 1983. Since the cause of action accrued when the challenged ordinance was adopted, *DeAnza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991), Azul should have filed its complaint "within three years of the May 1982 date of enactment or within one year of the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985)." Pet. App. B., 26a. Thus, the district court's judgment was vacated because of the lack of subject matter jurisdiction. This decision was not in error.

REASONS WHY THE WRIT SHOULD BE DENIED

A. There Is No Conflict In The Courts As To Whether There Is A Separate Direct Cause Of Action Under The Constitution When There Is An Available Remedy Under Section 1983.

Petitioner apparently contends that this Court should grant its petition because the decision below conflicts with a "series of decisions by this Court," Pet. at 13, as well as decisions from other circuits. However, the Ninth Circuit decision was based on existing precedent from this Court as well as decisions from its own and other circuits. No real or direct conflict exists. Accordingly, no issue has been presented requiring a decision by this Court.

While the Fifth Amendment is "self-executing" in the sense that the *remedy* of just compensation is grounded in the Constitution, it does not follow that a separate direct cause of action exists in addition to an available *statutory* remedy.

This Court and others have said that a direct cause of action is *not* available if a plaintiff has a statutory remedy to redress constitutional wrongs. *Davis v. Passman*, 441 U.S. 228 (1979); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981).

In *Davis v. Passman, supra*, 441 U.S. 228, the Court held that an action involving a sex discrimination claim by a Congressional employee against a Congressman could be filed directly under the Fifth Amendment but *only because the plaintiff did not otherwise have a statutory remedy available to her*, stating that litigants alleging constitutional deprivations "and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." 442 U.S. at 242.

In *Jacobs v. United States*, 290 U.S. 13 (1933), the Court established that "statutory recognition [is] not necessary," to bring a suit for just compensation. The question here is what remedy is appropriate when there *is* a statutory remedy available, namely § 1983, to redress *all* forms of constitutional violations as torts, including takings of property without just compensation.

In *Davis*, the Court relied on its reasoning in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where the Court allowed a direct cause of action under the Constitution because, otherwise, plaintiffs would have been left with *no* remedy to redress violations of the Constitution.

Later, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court stated:

> ". . . a [Bivens] cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress' . . . [citations omitted] . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18.

In *Carlson*, this Court viewed § 1983 actions as serving the same purpose as *Bivens* by providing a statutorily adequate remedy to redress constitutional wrongs, and considered it an "equally effective" remedy as *Bivens*. Thus, "complimentary" relief under *both Bivens*, (*i.e.*, a "direct" cause of action under the Constitution) and a statutory remedy is not necessary where the statutory remedy is effective.[6]

Following the Court's lead in these cases, the Ninth Circuit judgment below relied on established precedent, overlooked in its initial November 1, 1991 opinion, but cited in support of its July 23, 1992 opinion. For example, *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981) looked to the Court's decision in *Carlson v. Green*,

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[6] In *Carlson*, the Court determined that the statutory remedy involved there, the Federal Tort Claims Act (FTCA), was *not* as effective as a *Bivens* remedy and allowed the *Bivens* suit, even though plaintiff's allegations could also support a suit under the FTCA.

supra, 446 U.S. 14, in holding that the plaintiff there did not have a separate cause of action under the Constitution because it had a remedy under § 1983. In *Bretz v. Kellman*, 722 F.2d 503 (9th Cir. 1983), the court followed the precedent established in *Ward v. Caulk* and, applying the *Bivens* rationale, came to the same conclusion.

As the Ninth Circuit noted, other circuits are in accord, citing *Thomas v. Shipka*, 818 F.2d 496 (6th Cir. 1987); *Hunt v. Robeson County Dept. of Social Serv.*, 816 F.2d 150 (4th Cir. 1987); *Morrison v. Metropolitan Area Transit,* 702 F.2d 1037 (D.C. Cir. 1983); and *Bieneman v. City of Chicago,* 662 F. Supp. 1297 (N.D. Ill 1987), *appeal dismissed*, 838 F.2d 962 (7th Cir. 1988).[7]

Azul contends that this Court's enunciation of the "self-executing" nature of the just compensation clause discussed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), allows for essentially dual relief for a single federal violation based upon a single set of facts. In *First English*, the Court noted that this principle of the "self-executing" character of the just compensation clause has been established since *Jacobs v. United States*, 290 U.S. 13 (1933). There, the Court acknowledged that the right to compensation is grounded in the Constitution itself and guaranteed by the Constitution. Of course, since the Court enunciated those principles in *Jacobs*, this Court has ruled that § 1983 actions may be filed against local

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[7] While the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988) rejected the district court's conclusion about the availability of a direct cause of action, the court determined nonetheless that the same statute of limitations applicable to a 1983 claim applied under *Wilson* to a direct cause of action under the Constitution.

governments and municipal corporations, providing a remedy which was previously unavailable. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978).

Contrary to petitioner's assertion, the Ninth Circuit correctly applied the reasoning of the Supreme Court, and its decision is not in conflict with *First English* or other decisions of this Court.

Neither is there a "real and embarrassing conflict of opinion and authority between the Courts of Appeals." *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1950).

The only circuit that Azul cites that is in conflict with the other circuits on the issue of the availability of a direct cause of action irrespective of available statutory remedies is the Seventh Circuit, as reflected by the *Bieneman* case.[8] Yet the result in *Bieneman*, as here, is the same regardless of whether this court finds a direct cause of action. In *Bieneman*, the court held that even if there is a direct cause of action under the Constitution, the statute of limitations applicable to a § 1983 claim under *Wilson* should be applied.

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[8] The City is not unmindful of petitioner's citation to *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983), to suggest that a conflict on this issue also exists in the Fourth Circuit. Yet, in light of *Hunt v. Robeson County Dept. of Social Serv.*, 816 F.2d 150 (4th Cir. 1987), albeit in a nontakings context, where the court limited plaintiff to his remedy under § 1983, *Ocean Acres* is now of limited utility. Similarly, the holding in *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) does not squarely present a conflict on these issues requiring this Court's intervention. In that case and in *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978), the courts, in dicta, posed but did not answer questions whether takings cases are somehow different from other protected rights under the Constitution. *Wilson*, however, treats all violations of the Constitution as torts, including "damages to property."

Thus, even if the Seventh Circuit, being the only circuit at odds with the Second, Fourth, Sixth, Eight and Ninth on this issue, is correct, the application of that court's thinking would still result in the federal court being deprived of its subject matter jurisdiction here. *Bieneman* thus hardly presents a reason to grant the writ, and for prudential reasons alone, the petition should be denied.

B. There Is No Conflict In The Courts As To The Appropriate Statute of Limitations To Apply To A Cause of Action Seeking Relief Directly Under The United States Constitution.

Contrary to Azul's assertion, there is no conflict among the courts as to what the appropriate statute of limitations is for a constitutional tort. Both the Ninth Circuit (*Azul* and *DeAnza*) and the Eight Circuit (*Bieneman*) have said that § 1983 statute of limitations rules would apply to a direct cause of action. No court in the post-*Wilson* era has concluded differently.

Thus, the law is clear concerning the statute of limitations that applies to all constitutional violations and needs no further clarification.[9] *See Wilson v. Garcia*,

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[9] Despite petitioner's assertion to the contrary, "unclarity in the law" played no part in the Ninth Circuit's recent decision in *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), to "defer consideration of the appropriate statute of limitations for the surviving inverse condemnation claim." Pet. Brief at 22. Rather, the court stated that it would "not consider whether this claim is also barred by the one-year statute of limitations, Cf. *DeAnza Properties X Ltd., v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991), as the issue has not been properly raised on appeal. It may, of course, be addressed on remand." 942 F.2d 668, 675 n.5. In any

(continued)

471 U.S. 261 (1985); *Usher v. Los Angeles*, 828 F.2d 556 (1987).

Constitutional violations are torts, and this Court in *Wilson* determined that state law governs the *length* of the limitations period and that a standard "broad characterization" of all § 1983 claims best fits the statute's remedial interests and furthers the "federal interest in uniformity." 471 U.S. at 270.

This Court concluded that all constitutional wrongs should indeed be characterized in the same way and acknowledged that "injuries to property" fall within the panoply of "potential tort analogies." 471 U.S. at 277. Thus, *Wilson* resolved any conflicts that may have existed.

Adopting the Court's reasoning in *Wilson*, the Eighth Circuit in *Bieneman* reasoned that any "direct" cause of action under the Constitution's Fifth Amendment takings clause should also be filed within the time allowed for a § 1983 suit based upon the same federal right.

Wilson teaches that the nature of the claim, whether it is filed "directly" under the Fifth Amendment or asserted under § 1983 based upon the Fifth Amendment, is the same. In either case, the claim lies in *tort*.

Accordingly, the *Bieneman* court applied the same statute of limitations for takings cases filed directly under the Constitution as those filed under § 1983. It stated:

> "There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick

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(fn. continued)
event, conflict within a circuit should first be resolved intra-circuit before review to this Court is sought.

> whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy." 864 F.2d at 469.

Azul relies primarily on the Fourth Circuit case of *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983) (a pre-*Wilson* case) as purportedly in conflict with the Ninth Circuit (as well as the Eighth Circuit, based on *Bieneman*). However, *Ocean Acres* applied pre-*Wilson* rules. Since *Wilson*, cases out of the Fourth Circuit now follow the Eighth Circuit's approach and apply the state's personal injury limitations based upon *Wilson* even to "direct takings" claims. *See Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470 (W.D. VA 1987), *aff'd in part*, 840 F.2d 10 (4th Cir. 1988). Any conflict posed by *Ocean Acres* has now been re-evaluated by that circuit in light of this Court's *Wilson* decision.

Since any conflict that may once have existed has been resolved by *Wilson, Davis* and *Carlson*, this Court need not review this case to reiterate its position on this issue. Thus, petitioner seeks this Court's review only to obtain a longer statute of limitations to present its claims. At stake, however, is only Azul's interest to raise rents beyond the ordinance's limitations, despite its acknowledgment that the park operates profitably even under "vacancy control." Trial transcript, Vol. 1 at 154:4-6.

C. There Is No Conflict In The Courts As To When A Takings Claim Accrues For The Purpose of The Statute of Limitations Or Otherwise.

When a federal claim accrues is a question of federal law. *Venegas v. Wagner*, 704 F.2d 1144, 1145 (9th Cir. 1983). Courts of various circuits have all concurred that the statute of limitations begins to run when a plaintiff "knows or has reason to know of the injury which forms the basis for the action." *Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987). *See also Norco Constr. Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986), citing to *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983); *Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470, 474 (W.D. VA 1987), citing to *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

When that "knowledge of injury occurs" is, of course, a factual question dependant upon the peculiarity of each case.

Federal courts have determined in certain cases that a cause of action challenging an ordinance accrues on the date the ordinance is adopted. *Peter Henderson Oil Co., supra*. Here, evaluating a *Hall* physical takings claim, the Ninth Circuit relied on *DeAnza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991), and determined that the claim accrued upon the passage of the challenged provision of the RSO.

Azul cites to no authority contradicting these decisions. Instead, Azul suggests that cases applying a "continuing wrong" doctrine should be applied. Yet the "continuing wrong" doctrine does not supply the Court

with a methodology to determine *when* a cause of action *accrues*; rather, it *tolls* the running of the statute of limitations under circumstances where it is shown, and a factual determination is made, that the *prohibited activity* is a continuing one. *See e.g. United States v. Dickinson*, 331 U.S. 750, 751 (1947); *Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470, 474 (W.D. VA 1987); (*Cf. Ward v. Caulk*, 650 F.2d 1144, 1147, acknowledging the existence of the doctrine but rejecting the "continuing wrong" doctrine under the facts there because "a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.")

That different courts have applied the "continuing wrong" doctrine to the particular factual settings before them does not illustrate an analytical conflict between the courts at all but merely evidences conflicting results based on an "ad hoc, factual inquiry" into each case to determine what principles to apply. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295 (1981).

In contrast to cases involving the continual filling of a dam with water (*Dickinson*), or a "continuous chain of events" (*Barbaccia v. County of Santa Clara*, 451 F. Supp. 260 (1978)), or "continual unlawful acts" (*Ward*), the Ninth Circuit correctly determined that this theory was inapplicable to the facts here. The enactment of the challenged RSO provision occurred at one time.

Thus, based on the allegations in the complaint about the invalidity of the ordinance, the Ninth Circuit correctly found that the taking occurred when the ordinance was adopted. Since no real analytical conflict is presented on this issue, it is not appropriate for this Court's review. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

D. Petitioner's Regulatory Taking Claim Is Not Properly Before This Court Because It Was Not Litigated Below.

It is a general rule of this Court that it will not decide federal constitutional issues raised for the first time in this Court and not fully considered by the Court of Appeals. *Carlson v. Green*, 446 U.S. 14 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). We recognize that based on *Carlson* as well as *Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992), with respect to cases arising from the federal courts the rule is prudential and does not deprive the Court of jurisdiction. Yet, for prudential reasons, the Court should not consider the question here.[10]

Unlike *Yee* (a pleading case) where "it is *unclear* whether petitioners made [the regulatory taking] argument below" or plead the requisite facts in its complaint, 112 S.Ct. at 1532 (emphasis added), the record here is unambiguous in this regard. Azul never alleged that the ordinance did not "substantially advance a legitimate state interest." *See Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987). Nor did Azul allege that it was deprived of any economic use of its property under the test of *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Resp. App. A1-A5.

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[10] Even if this Court were to find that the Ninth Circuit was wrong in holding that the statute of limitations barred the action, any review by this Court of a regulatory taking claim would be inappropriate.

Instead, Azul alleged that the ordinance caused a physical occupation of its property as the basis of its taking claim. Consequently, at trial Azul presented evidence to support its physical occupation theory. Not surprisingly, the district court found:

> "In this case, the plaintiff does not argue that there was no legitimate state interest in enacting the Rent Stabilization Ordinance, including the vacancy control provisions." Pet. App. C., 43a.[11]

Since petitioner did not argue or present evidence relating to a regulatory taking at the trial below, and since neither the trial court nor the Ninth Circuit "squarely" addressed or made any ruling on this issue, *Yee*, 112 S.Ct. at 1534, this issue is not properly preserved for this Court's review.

Azul's petition for review relies heavily on the withdrawn Ninth Circuit opinion and the vacated district court judgment. It claims that it was error on the part of both courts to find that the City's ordinance substantially advanced a legitimate state interest and seeks this Court's review of that issue. Petitioner, however, is precluded from seeking review of both those decisions, now vacated and withdrawn, because of its failure to file a cross-appeal of *either* decision.

The Court has previously held that a party who has earlier failed to cross-appeal in a *lower* appellate court cannot on an appeal from the lower court attack the

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[11] The district court held that the vacancy control provision advanced a legitimate governmental interest. It did so because that issue was one of the elements to consider as part of *Hall*'s "three-part analysis." Pet. App. C., 33a. It never decided whether the vacancy control provision resulted in a *regulatory* taking.

judgment which was at issue in the earlier appeal for purposes of obtaining a modification in his favor. *Penfield Co. v. Securties & Exchan. Comm.* 330 U.S. 585 (1947). That is what Azul seeks to do here. In its cross-appeal, Azul chose not to appeal the decisions below that hold that the RSO substantially advances a legitimate governmental interest. It instead chose to limit its issue on cross-appeal to the availability of expert witness fees. See U.S. Court of Appeals Docket No. 90-56066, Appellee's Brief.

Azul should thus be barred from now attacking the portion of the judgment below that it disagrees with, when it did not seek review of that portion by way of cross-appeal. *Letulle v. Scofield*, 308 U.S. 415 (1940), *reh. den.*, 309 U.S. 694 (1940).

E. Petitioner's Regulatory Taking Claim Is Not Ripe For Review In This Court Because Petitioner Has Not Exhausted Administrative Remedies Nor Sought And Been Denied Just Compensation In State Court.

For this Court to review petitioner's newly-fashioned regulatory takings claim, this Court would have to find that the Ninth Circuit erred in its ruling on the statute of limitations, would have to overlook the fact that neither the district court nor the Court of Appeals reviewed a regulatory takings claim, and overlook the fact that Azul never sought a final administrative determination of the application of the ordinance to it and never first presented its claims in state court. This Court has ruled that under these circumstances, no federal court should

review a claim such as this unless remedies have first been exhausted.

This Court established under a two-tier analysis in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a regulatory takings claim is not ripe for review in federal court unless the plaintiff has obtained a final administrative determination of the application of the ordinance to it and first requested and been denied just compensation in state court. Azul has done neither.

The district court excused Azul from meeting the *Williamson* test because petitioner's physical occupation theory of liability did not require an exhaustion of administrative remedies. *Hall, supra*, 833 F.2d at 1282 n.28. However, that same reasoning cannot be applied to Azul's newly fashioned regulatory takings claim. Rather, Azul was required to obtain a final decision from the City on the ordinance's application to its property *and* seek compensation through the state courts, as required by *Williamson*.[12]

This Court has already analyzed the "*Yee* factors" and concluded they do not give rise to a *physical* taking. In essence, petitioner is seeking review of the Ninth Circuit's original decision by refashioning the *Yee* physical taking factors and giving them another name.

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[12] Azul might argue that when it filed its complaint, prior to *First English*, California did not recognize the remedy of damages for a regulatory taking, and that it had no adequate remedy at that time. The lack of damages as a remedy did not excuse Azul from seeking compensation in state court as required by *Williamson*. Nothing prevented Azul from presenting its claim in state court, as the landowner in *First English* did, and then proceeding to federal court, as the landowner did there.

Petitioner now suggests that the "*Yee* factors" should be considered as the standard for analyzing *regulatory* takings. Petitioner seeks to have the Court depart from the standards established by *Agins* and *Nollan*. To date, nothing stated by this Court or lower courts suggests the appropriateness of such a novel approach. Moreover, there is no conflict among the circuits on this issue.[13] Therefore, no issue has been framed which justifies review by this Court. As this Court observed in *Yee*:

> "... were we to address the [regulatory taking] issue here, we would apparently be the first court in the nation to determine whether an ordinance like this one effects a regulatory taking." 112 S.Ct. at 1534.

This Court, therefore, should "leave the regulatory taking issue for the California Courts to address in the first instance." *Id.* at 1534.

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[13] To the extent *Sandpiper Mobile Village v. City of Carpinteria* No. B058435, 1992 Cal.App. LEXIS 1228 (Cal. Ct. App., Oct. 15, 1992) and *Colony Cove Association v. The City of Carson* No. B062956 (Cal. Ct. App., Oct. 22, 1992), may represent such a conflict, the California Supreme Court should have the first opportunity to resolve it.

CONCLUSION

Based on the foregoing, the City of Los Angeles respectfully submits that the decision of the Ninth Circuit Court of Appeal was proper, and Azul's petition should be denied.

DATED: December 21, 1992.

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AZUL PACIFICO, INC.,
a California corporation,
Plaintiff,
vs.
CITY OF LOS ANGELES,
a Municipal corporation,
Defendant.

Case No. 87 02287

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, DAMAGES FOR VIOLATION OF CIVIL RIGHTS

A JURY TRIAL IS DEMANDED

PLAINTIFF AZUL PACIFICO, INC., a California corporation, hereby alleges:

JURISDICTION

1. The Court has jurisdiction under 28 U.S.C. 1331(a) and 1343(3) in that the claim arises under the First and Fourteenth Amendments to the Constitution of the United States, and under 42 U.S.C. §§1981, 1983

and 1988 as more fully appears herein. This is a civil action where the matter in controversy exceeds in sum of $10,000.00 exclusive of interest and costs.

PARTIES

2. Plaintiff AZUL PACIFICO, INC. is a corporation duly organized and in good standing under the laws of the State of California.

3. Defendant CITY OF LOS ANGELES is a municipal corporation located in the County of Los Angeles, State of California.

4. Plaintiff is the owner of the Tahitian Terrace Mobile Home Park (the "Park") within the City of Los Angeles. The Park contains 158 spaces rented for occupancy by mobile homes used by the owner of such mobile homes for residential purposes.

FIRST CLAIM

5. On or about April 21, 1979, the City of Los Angeles adopted Ordinance No. 152,120 and amended said Ordinance on September 1, 1980 by adoption of Ordinance No. 154,237, (such Ordinances, as amended, being referred to herein as the "Rent Control Law"). The City of Los Angeles, through its agents, employees and personnel, is enforcing the provisions of the Rent Control Law.

6. The Rent Control Law has had the effect of depriving the Plaintiff of all use and occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff. Plaintiff has no legal right to receive any compensation for the

rights now enjoyed by the tenants of the Park other than the stream of income from rents as regulated by the Rent Control Law.

7. The tenants of the Park have the power and ability, and have used that power and ability on many occasions, to sell the rights of use and occupancy of Plaintiff's real property, which have been transferred to said tenants by operation and enforcement of the Rent Control Law, to other parties without the consent of Plaintiff and to receive consideration from such other parties for the transfer of such rights.

8. The consideration for which the tenants of the Park can, and do, transfer the ownership of individual coaches is substantially in excess of the value of those coaches and the excess consideration over the value of the coaches is due to the rights of permanent physical occupation at a fixed rent which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

9. The tenants of the Park have no obligation to account to Plaintiff for the proceeds of the sale of the rights which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

10. The operation and enforcement of the Rent Control Law effects a taking of Plaintiff's property for public use and benefit without payment of just compensation. The enforcement of the Rent Control Law by the City of Los Angeles constitutes a taking of property by said defendant for private purpose in violation of the Fifth and Fourteenth Amendments to the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§1981 and 1983.

11. As a direct and proximate result of the operation and enforcement of the Rent Control Law by Defendant, Plaintiff has suffered damages in the amount of $15,000,000.00.

SECOND CLAIM

12. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1 through 11 hereof as though fully set forth.

13. The Rent Control Law is constitutionally infirm in that no emergency exists which justifies its imposition on plaintiff, and, therefore, continued enforcement thereof violates the Fifth and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. §§1981 and 1983.

WHEREFORE, plaintiff prays against defendant as follows:

1. For damages in the amount of $15,000,000.00

2. For declaration that the Rent Control Law is unconstitutional, invalid and unenforceable and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof;

3. For a permanent injunction enjoining defendant, its agents, employees and all those acting by, through, for, on behalf, or in concert with defendant, or pursuant to any of the provisions of the ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the ordinance;

4. For costs of suit;

5. For attorneys' fees as provided by 42 U.S.C. §1988; and

6. For such other and further relief as the court deems proper.

Dated: April 9, 1987.

SHERMAN L. STACEY
JONATHAN S. HORNE

By /s/ Sherman L. Stacey
Sherman L. Stacey
Attorney for Plaintiff

A JURY TRIAL IS DEMANDED.

SHERMAN L. STACEY
JONATHAN S. HORNE

By /s/ Sherman L. Stacey
Sherman L. Stacey
Attorney for Plaintiff

APPENDIX B

SEC. 151.01. DECLARATION OF PURPOSE.

There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor.

Tenants displaced as a result of their inability to pay increased rents must relocate but as a result of such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a consequence must expend less on other necessities of life. This situation has had a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households. This problem reached crisis level in the summer of 1978 following the passage of Proposition 13.

At that time, the Council of the City of Los Angeles conducted hearings and caused studies to be made on the feasibility and desirability of various measures designed to address the problems created by the housing shortage.

In August, 1978, pending development and adoption of measures designed to alleviate the City's housing crisis, Council adopted Ordinance No. 151,415 which temporarily rolled back recently imposed rent increases, and prohibited most rent increases on residential rental properties for six months. Ordinance No. 151,415 expires on April 30, 1979.

This ordinance has successfully reduced the rate of rent increases in the City, along with the concomitant hardships and displacements. However, a housing shortage still exists within the City of Los Angeles and total deregulation of rents at this time would immediately lead to widespread exorbitant rent increases, and

recurrence of the crisis, problems and hardships which existed prior to the adoption of the moratorium measure.

Therefore, it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units. In order to assure compliance with the provisions of this chapter violations of any of the provisions of this chapter may be raised as affirmative defenses in unlawful detainer proceedings. **(Amended by Ord. No. 166,130, Eff. 9/16/90.)**

No. 92-886

(3)

Supreme Court, U.S.
FILED
DEC 29 1992
THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AZUL PACIFICO, INC.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

REPLY MEMORANDUM

---

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REPLY MEMORANDUM

Petitioner Azul Pacifico, Inc. ("Azul") files this memorandum in reply to the brief in opposition of respondent City of Los Angeles. As demonstrated in the following paragraphs, respondent has failed to overcome the compelling reasons supporting review by this Court of the exceedingly important and recurring issues presented by this case.

1. The decision below restricts victims of takings by local governmental entities to the remedy created by Congress in 42 U.S.C. § 1983. That limitation is inconsistent with several of this Court's decisions and the decisions of other circuits. Pet. at 13-19. Although respondent denies the existence of a conflict, Opp. at 10, its brief in opposition does nothing to refute it, and, indeed, further illustrates the existence of the conflict and the reasons why the Court should grant review.

a. Respondent first contends that review is unnecessary because the Ninth Circuit's holding on the § 1983 issue is consistent with this Court's analysis in *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). In fact, the Ninth Circuit's decision is flatly inconsistent with both *Davis* and *Carlson*.

In *Carlson*, the Court held that a prisoner's estate could bring a direct constitutional claim for Eighth Amendment violations despite the availability of alternative statutory relief under the Federal Tort Claims Act. 446 U.S. at 18-23. The Court held that unless "Congress has provided an alternative remedy which it *explicitly declared*," *id.* at 18 (emphasis added), to be "a *substitute* for recovery directly under the Constitution," *id.* at 18-19 (emphasis in original), the Court will *not* foreclose direct constitutional relief.

Respondent asserts that *Carlson* implicitly understood § 1983 to pre-empt all direct rights of action under the Constitution, Opp. at 12, but respondent does not even attempt to show that Congress "explicitly declared" that § 1983 is "a substitute" for takings claims brought directly under the Fifth Amendment. Nor could it possibly make such a show-

ing. There is, in fact, *no* indication that Congress intended § 1983 to limit or restrict the law of constitutional remedies in any way whatsoever, let alone to eliminate the only private remedy articulated explicitly in the Constitution. Indeed, the "express language of [the Just Compensation] Clause requires that 'compensation' be paid for any governmental taking," *Carlson*, 446 U.S. at 43 n.9 (Rehnquist, J., dissenting), and it would turn *Carlson* on its head to hold, as the Ninth Circuit did here, that Congress has implicitly overridden that explicit constitutional right.

Moreover, in *Davis*, which held that a sex discrimination claim against a Member of Congress could be maintained directly under the Constitution, the Court expressly recognized that the Fifth Amendment provides a constitutional remedy for just compensation that is neither dependent on nor eliminated by any statutory alternative. In explaining its holding in *Davis*, the Court unequivocally stated that "*Jacobs v. United States*, 290 U.S. 13 (1933), held that a plaintiff who alleged that his property had been taken by the United States for public use without just compensation *could bring suit directly under the Fifth Amendment*," 442 U.S. at 242 n.20 (emphasis added), even though *Jacobs* was decided after Congress had also authorized takings claims against the United States under the Tucker Act. *See* 290 U.S. at 13-16.

Thus, *Davis* and *Carlson* do not provide a basis for denying certiorari. On the contrary, the decision below is inconsistent with those cases and that is reason enough alone to warrant review by this Court.

b. Respondent's efforts to reconcile the Ninth Circuit's holding that Azul "has no [takings] cause of action directly under the United States Constitution," Pet. App. at 26a, with *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), are equally unsupported by law or logic. Respondent is forced to concede that *First English* made clear that the Fifth Amendment is " 'self-executing' " and that "the right to compensation is grounded in the Constitution itself and guaranteed by the Constitution," Opp. at 13, but nonetheless contends that "it does

not follow that a separate direct cause of action exists in addition to an available *statutory* remedy." *Id.* at 11 (emphasis in original). That is, however, exactly what follows from *First English*.

The court below also acknowledged, at least in its initial opinion, Pet. App. at 20a, that *First English* squarely held "that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.' " 482 U.S. at 315 (citation omitted).

Although the Court in *First English* did not expressly address the interplay between 42 U.S.C. § 1983 and the "remedy for interference with property rights amounting to a taking" that the "Constitution . . . dictates," 482 U.S. at 316 n.9, it did hold that the landowners in that case had stated a constitutional claim for just compensation, even though they had *not* invoked § 1983 either in the California courts or in this Court. The Court thereby implicitly rejected the concept that § 1983 could be the only vehicle for takings claims against non-federal governmental entities, the position that had been advocated by the United States in its *amicus* brief. *See* Brief for the United States as *Amicus Curiae* at i, 6, 17, 30-34, in No. 85-1199 (U.S. filed Nov. 4, 1986).

Respondent seeks to discount *First English* because that decision relied on *Jacobs*, 290 U.S. at 16, arguing that "since . . . *Jacobs*, this Court has ruled that § 1983 actions may be filed against local governments and municipal corporations, providing a remedy which was previously unavailable." Opp. at 13-14. But respondent's reliance on *Jacobs* makes no sense because the decision recognizing that municipalities are subject to § 1983 liability, *Monell v. New York City Dep't of Social Svcs.*, 436 U.S. 658 (1978), was rendered almost a decade before *First English* held that the Fifth Amendment affords a direct and independent constitutional remedy for just compensation. And the mere fact that § 1983 damages actions were not deemed "available" against municipalities until over 100 years after § 1983 was enacted is, in and of itself, strong proof that there is no "clear congressional man-

date," *Carlson*, 446 U.S. at 23, to substitute such actions for Takings Clause claims brought directly under the Constitution.[1]

c. Respondent does not take issue with Azul's contention (*see* Pet. at 15-19) that there is conflict and uncertainty among the lower courts concerning whether § 1983 is the only mechanism for asserting a takings claim. Rather, respondent resorts to a wholly tautological argument that the conflict is not sufficiently important to warrant review because the court below reached the correct result. For example, although respondent concedes, Opp. at 14, that the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), held that under *First English* "takings suits may be filed directly under the Constitution" as well as § 1983, *id.* at 468, it contends that the clear conflict between *Bieneman* and this case on the § 1983 issue is of no concern because *Bieneman* also concluded that direct takings claims are governed by the same statute of limitations as § 1983 claims. That argument, however, simply assumes that the Seventh Circuit's ruling on the statute of limitations issue was correct, which it is not. *See* Pet. at 19-25; *see infra* pages 5-7.

Similarly, respondent acknowledges (Opp. at 14 n.8) that the Fourth Circuit in *Ocean Acres Ltd. Partnership v. Dare County Bd. of Health*, 707 F.2d 103, 105 (4th Cir. 1983), *aff'g*, 514 F. Supp. 1117, 1120 (E.D.N.C. 1981), held that direct takings claims may be brought in addition to whatever relief may be available under § 1983. But respondent asserts that *Ocean Acres* is "of limited utility" because the subsequent Fourth Circuit decision in *Hunt v. Robeson County Dep't of Social Svcs.*, 816 F.2d 150, 152 n.2 (4th Cir. 1987)—a case that did *not* involve a takings claim—held that constitutional claims against local governments could only be

---

[1] The fact that *state* governmental entities, as opposed to local ones, *cannot* be held liable for damages under § 1983, *Quern v. Jordan*, 440 U.S. 332 (1979), also strongly supports the conclusion that Congress did not intend § 1983 to eliminate the direct right of action for takings claims, which may be asserted against either state or local governments that take private property without just compensation.

pursued under § 1983. *Hunt*, however, only adds to the confusion because it does not address *Ocean Acres*, and subsequent to *Hunt* the Fourth Circuit affirmed yet another district court decision holding that takings claims may be brought directly under the Constitution. *See Jackson v. City Council of Charlottesville*, 659 F. Supp. 470, 474 (W.D. Va. 1987), *aff'd in relevant part*, 840 F.2d 10 (4th Cir. 1988).

Respondent also contends that *Bieneman* and *Ocean Acres* are nothing more than anomalies arrayed against an otherwise solid and well reasoned body of precedent from other circuits. Opp. at 15. The cases that respondent cites do not, however, support that contention. Other than the Ninth Circuit's decision here, Azul is aware of *no* other court in a takings case ever to have held that § 1983 is the exclusive vehicle for a takings remedy, and respondent has not identified a single such case. Although several circuits, like the Fourth Circuit in *Hunt*, have employed sweeping language outside the takings context that could be interpreted to mean that *all* constitutional claims must be brought under § 1983, *see* Pet. at 17-18, only the Sixth Circuit's decision in *Thomas v. Shipka*, 818 F.2d 496, 502-03 (6th Cir. 1987), seemed to have done so after considering the possibility that direct takings claims would be foreclosed.

2. Respondent argues that this Court, in *Wilson v. Garcia*, 471 U.S. 261 (1985), has already decided that state personal injury statutes of limitations govern direct constitutional takings claims. Opp. at 15-17. But that is not remotely correct. *Wilson* is a § 1983 case that turned on this Court's interpretation of congressional intent and did *not* address the proper limitations period for Takings Clause claims asserted under the Constitution itself.

a. This Court has flatly rejected the argument that federal courts should look reflexively to state law to fill in the interstices of federal constitutional remedies. *See Carlson*, 446 U.S. at 24-25 n.11. Borrowing state law in § 1983 cases is compelled by 42 U.S.C. § 1988, which expressly "requires that § 1983 actions be governed by 'the common law, as modified and changed by the constitution and statutes of the

State wherein the court having jurisdiction of [the] civil cause . . . is held . . . .' " *Id.* at 24 n.11. However, § 1988 "does not in terms apply" to direct constitutional claims, *id.*, and "there are cogent reasons not to apply it even by analogy." *Id. See* Pet. at 22-25.

Application of state personal injury statutes of limitations to direct takings claims would, for example, result in anomalous, absurd and utterly capricious results. While a regulatory takings claim based on a mobile home rent control ordinance brought in California state court would be subject to the specific five-year state-law statute of limitations that applies to takings claims, *Colony Cove Ass'n v. City of Carson*, 10 Cal. App. 4th 1646, 92 Daily Journal D.A.R. 15558, 15560 (1992), the exact same claim brought in federal court would, according to respondent, be governed by California's one-year limitations period for "personal injury" actions. In other words, federal takings claims filed in state court would be subject to a state statute of limitations developed specifically for such claims, while the same claim filed in federal court in the same state would be governed by that state's personal injury statute of limitations.

b. Respondent further contends that the *Wilson* analysis is dispositive here because all "[c]onstitutional violations are torts." Opp. at 14 n.8, 16. But takings claims are distinctly *not* tort-based and are not even remotely analogous to personal injury actions for tortious conduct. Indeed, whereas the law of torts perceives as wrongful certain types of conduct, the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . . This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 314-15 (citations omitted) (emphasis in original). It is precisely this unique feature of the right created by the Fifth Amendment that has led some courts, including the district court here, to conclude that statutes of limitations do not extinguish takings claims altogether but simply limit

the amount of "just compensation" that may be recovered. Pet. App. at 42a; *see, e.g., Ocean Acres*, 514 F. Supp. at 1123.

3. Respondent also argues that Question 4 of the petition regarding when a takings claim accrues for statute of limitations purposes presents mere "factual" issues that are not suitable for review by this Court. Opp. at 18-19. However, the Ninth Circuit on rehearing reiterated and relied on the straightforward, inflexible and manifestly incorrect rule of law concerning accrual established in *De Anza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991), to bar Azul's takings claims.

De Anza not only is a "physical" takings case that was "implicitly overruled," Pet. App. at 27a, by *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), but the rule that it articulates—that a takings "cause of action accrue[s] when the ordinance at issue was enacted" (Pet. App. at 26a)—is materially inconsistent with the accrual principles articulated by this Court in *United States v. Dickinson*, 331 U.S. 745, 748 (1947). *Dickinson* rejected a similar approach and held that "[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *Id.* at 748.

The *De Anza* rule also squarely conflicts with the recent decision of the California Court of Appeal in *Colony Cove Ass'n v. City of Carson*, 10 Cal. App. 4th 1646, 92 Daily Journal D.A.R. 15558 (1992). *Colony Cove* involved a regulatory takings challenge to a local mobile home rent control ordinance almost identical to the Los Angeles RSO at issue here. The *Colony Cove* court rejected the defendant's argument that the California five-year limitations period had begun to run ten years earlier when the ordinance was enacted, 92 Daily Journal D.A.R. at 15560, refusing to "adopt the City's position that appellant is forever barred from challenging the constitutionality of the Ordinance even though the alleged wrong is continuing," because "the continued enforcement of an unconstitutional statute cannot be insu-

lated by the statute of limitations." *Id.* The court in *Colony Cove* thus held that

> each sale of a [mobile home] constitutes a separate taking, and thus creates a discrete cause of action upon which appellant may sue .... Accordingly, a new limitations period commenced with the sale of each [mobile home] located in the Park, and appellant's claim[s] for damages are limited to those [mobile homes] sold within the five-year period prior to the time it filed its complaint.

Id. (citations omitted). That is precisely the approach that the district court took and the Ninth Circuit rejected in this case. *See* Pet. App. at 16a, 42a, 57a, creating the same kind of conflict between state and federal courts in California that prompted the Court to grant review in *Yee*. *See* 112 S. Ct. at 1534.

4. Although respondent does not dispute the importance of the regulatory takings issue left open in *Yee*, it argues that the Court should, for "prudential reasons," refrain from resolving that issue in this case. Respondent's efforts to shield the Los Angeles RSO from scrutiny are, however, predicated on distortions of the record below and a serious misunderstanding of this Court's cases.

a. Respondent first contends that the Court should not review the regulatory takings issue because Azul purportedly did not raise it below. However, as Azul has demonstrated, Pet. at 4-5, its complaint broadly raised a claim that the Los Angeles RSO, in conjunction with the California Mobile Home Residency Law, "effect[ed] a taking of [Azul's] property for public use and benefit without payment of just compensation." Complaint ¶ 10, at 3; *see* Opp. App. A at 3. Under *Yee*, this was more than sufficient to preserve the regulatory takings question. 112 S. Ct. at 1532 ("Having raised a taking claim in the [lower] courts, ... petitioners could have formulated any argument they liked in support of that claim here.").

Moreover, *respondent* itself raised and argued the regulatory takings issue both in the district court, *see, e.g.*, App.

A, *infra*, 1a-5a, and in the Court of Appeals, *see, e.g.*, App. B, *infra*, 6a-9a. As a result, the district court analyzed that issue at "great lengths," Opp. at 7, and decided it. Pet. App. at 43a-46a. And the Court of Appeals likewise necessarily addressed the regulatory takings issues in its initial opinion, resolving some issues in favor of Azul and some in favor of respondent. *See* Pet. at 9-12.[2]

Thus, the record below is well-developed and there is no reason for the Court to refrain from addressing the undoubtedly important issues left open in *Yee*. 112 S. Ct. at 1534. Since *Yee*, California courts have reached results that not only differ from the Ninth Circuit's analysis of the regulatory takings issues in this case, but that also contradict each other. *Compare Colony Cove*, 92 Daily Journal D.A.R. at 15559 *with Sandpiper Mobile Village v. City of Carpinteria*, 10 Cal. App. 4th 542, 547-50 (1992). The Court should grant review to clarify the regulatory takings factors articulated in *Yee* and to determine whether the Los Angeles RSO has "'go[ne] too far' "[3] and taken Azul's property.

b. Finally, respondent contends that Azul's regulatory takings claim is not ripe for review because it has not exhausted state administrative and judicial procedures for seeking just compensation. Opp. at 23-24. But such procedures were neither available nor adequate, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985), and invocation of those procedures was not necessary here. Indeed, in *Yee*, the Court made

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[2] Respondent's perplexing argument (Opp. at 21-22) that Azul was somehow required to raise in a "cross-appeal" the regulatory takings issues decided against it by the district court and Court of Appeals completely misses the mark. Because Azul prevailed on its takings claim in the district court, it was entitled "without taking a cross-appeal, [to] urge in support of [the] decree any matter appearing in the record, although [its] argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it," *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924), and also is entitled to advance such arguments on certiorari in this Court.

[3] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

clear that Azul was not required to exhaust state administrative remedies to proceed with its "*facial* challenge to the ordinance." 112 S. Ct. at 1532 (emphasis in original). Moreover, as the California Court of Appeal in *Colony Cove* recently held, "[i]t is preposterous to contend" that Azul was required to request "a rent increase . . . after the sale of each [mobile home]," because the incoming tenant, "by paying the 'premium,' has already paid the equivalent of advance rent to the former tenant." 92 Daily Journal D.A.R. at 15560. Accordingly, "[a]n application for a rent increase in these circumstances would be a patently absurd and obviously futile gesture," and the court refused to "require such folly." *Id.*

Nor was Azul required first to seek relief in the California courts before seeking relief from the federal district court. As the court below held in its initial opinion, Pet. App. at 4a-5a, and respondent acknowledges, Opp. at 23 n.12, at the time Azul filed its complaint, the California courts did not recognize either the physical takings theory of recovery *or* the regulatory takings claim subsequently recognized in *First English*. And the "futility of a state court action satisfies the second *Williamson* ripeness requirement: Property owners in this type of case can file immediately in federal court." Pet. App. at 5a.

CONCLUSION

For the foregoing reasons, and the reasons stated in Azul's petition for writ of certiorari, this Court should grant a writ of certiorari.

Dated: December 29, 1992

Respectfully submitted,

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APPENDIX

APPENDIX A

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV-87-02287-LEW-(Gx)

AZUL PACIFICO, INC., a California corporation,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

Trial:
Date: January 11, 1990
Time: 9:00 a.m.
Place: Courtroom 4

DEFENDANT'S TRIAL BRIEF

---

* * *

III

THE ORDINANCE SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST.

* * *

A. Rent Control Is Within The City's Police Power.

The law is well-settled that a rent control ordinance is a proper subject within the City's legislative police power. *Block v. Hirsch*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Pennell v. City of San Jose*, 485 U.S. ___ , 108 S.Ct. 859, 99 L.Ed. 2d 1 (1988). Preventing unreasonable rent increases caused by the City's housing shortage is a legitimate exercise of the City's police power. *Pennell v. City of San Jose, supra*, 108 S.Ct. 849, 858 (1988). As the Supreme Court in *Pennell* stated:

> "... we have long recognized a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. ... (one purpose of rent control is 'to protect persons with relatively fixed and limited incomes, consumers, wage earners ... from undue impairment of their standard of living')". *Pennell* at 858. (Citations omitted).

B. The 1982 and 1984 Provisions Of The Rent Stabilization Ordinance Substantially Advance A Legitimate State Interest.

The RSO's objectives are clearly set forth in its Declaration of Purpose:

> "There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor.
>
> Tenants displaced as a result of their inability to pay increased rent must relocate but as a result of

> such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a consequence must expend less on other necessities of life."
>
> * * *
>
> "Therefore it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units." (Exhibit 334.)

The test to determine whether an ordinance substantially advances a legitimate state interest was stated in *Hall* as follows:

> "The test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it 'rationally could have believed that the act would promote its objective' ". 833 F.2d at 1280.

As set forth in the aforementioned Declaration of Purpose, the City Council enacted the RSO to regulate rents so as to "safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units."

The City Council files will show that, as applied to mobilehome parks, this purpose is met. The City Council files reveal the purpose behind the 1982 and 1984 amendments to the RSO restricting increases upon the sale of a coach. One of the purposes for the 10% limit on rent increases upon coach sales was to "more fairly apportion any economic gains between the mobilehome park owner and mobilehome coach owner" which results from the sale of a mobilehome which remains on its pad, while still preventing excessive post sale rent hikes from mobilehome spaces which could prevent the sale of the unit". (Exhibit 292-

8.) The Governmental Operations Committee of the City Council noted that tenants who testified before them felt that if there were no controls preventing mobilehome park owners from raising the coach rent upon sale, the park owners would be free to raise the rent to "prohibitive levels". The City Council found that:

> "The tenants feel that it would be virtually impossible to sell their mobilehomes if they wished to move if vacancy decontrol was in effect. This would be because vacancy decontrol would permit the mobilehome park owner to raise the rent to what prospective buyers might feel was "prohibitive." Exhibit 292-8, p. 2.

The legislative history shows that the 10% cap on rent increases upon resale was a compromise between landlords and tenants to allow landlords some rental increase at the same time protecting mobilehome tenants from potentially losing their economic investment. This type of regulation is lawful because "[s]tates have broad police power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Pennell vs. City of San Jose*, 108 S.Ct. 849, 858 (1988). Thus, the City Council's restriction upon the landlord's ability to strip away a mobilehome tenant's investment is a legitimate exercise of its police power.

The legislative history behind the RSO will also show that the underlying purpose of "vacancy decontrol" in general has been to provide an incentive for apartment owners to maintain their housing and make the necessary repairs. (Exhibits 303-1, p. 6, 316-2, pp. 3-4, 316-7, 318-1, p. 9, 318-2, p. 10, 321-4, p. 5 (Motion 8A)). The City Council reasoned that if landlords of conventional housing could anticipate raising rent to market upon a vacancy, they would more likely use a portion of that money to make repairs on their property. Since mobilehome parks, by their nature, do not require the same level of maintenance as

apartment buildings because the coaches are maintained by their owners, (Exhibit 321-4, p. 5.) a similar provision with respect to mobilehomes was unnecessary.

* * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-55853

AZUL PACIFICO, INC., a California Corporation,
Plaintiff and Appellee,

vs.

CITY OF LOS ANGELES, a Municipal Corporation,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV-87-02287-LEW
The Honorable Laughlin E. Waters, Judge

APPELLANT'S OPENING BRIEF

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* * *

V. Regulating the Economic Relations Between Landlords And Tenants Has Historically Been Viewed As A Constitutional Exercise of Police Powers.

Up to now, rent control has traditionally been upheld as a constitutionally valid form of price control to protect tenants as consumers. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). Eviction controls have also been upheld, *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921), and have specifically been found not to constitute permanent physical occupations. *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3rd Cir. 1984). The notion that such controls constitute a "physical occupation" has also been previously rejected by the Supreme Court. *Fresh Pond Shopping Center Inc. v. Callahan*, 446 N.E. 2d 1060 (Mass. 1983), *app. dism.* 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983).

Pennell, in reaffirming the high court's rule that rent control is per se constitutional, specifically recognized that:

> "the Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly." 485 U.S. at 11.

The *Pennell* court acknowledged that preventing excessive rents caused by the housing shortage in the City of San Jose was a legitimate exercise of the City's police powers.

The factors that the *Pennell* court considered to find the San Jose ordinance constitutional are the same factors that exist here. Judge Waters specifically found that "there is a shortage of low cost housing in the City of Los Angeles, including mobile home rental space." (C.D. 138, 4:11-13). The court found that in the past the shortage has "led to abuses of mobile home park tenants by landlords." (C.D. 138, 4:12-14) Most tellingly, the court found that the economic climate surrounding mobile home parks in Los Angeles was one which was "distorted" with demand far exceeding supply (C.D. 138, 19:23-27), resulting in a "mo-

nopoly, which is market *failure.*" (Emphasis in original) (C.D. 138, 22:6-7). Thus, the court reasoned that the City has a legitimate state interest in regulating the mobile home park industry, which it termed "a prime candidate for government regulation." (C.D. 138, 22:6-8). However, the court felt constrained by the holding of *Hall*, which it considered binding.

Mobile home coach tenants have a "significant financial investment" in their tenancies, unlike apartment dwellers. They purchase their coach, most often through financing arrangements with lenders. If they could be forced to move or suffer huge, unaffordable rent increases at the whim of the landlord, tenants would be forced to move in an uncertain market where spaces are few and far between.

Rent regulation is needed because there is a housing shortage. The RSO's rent regulation was designed to address two results of that shortage, unreasonable rents and the forced sale of coaches at distress prices. The RSO's annual rent provisions address the first evil while the cap on rental increases address the latter.[1]

The California Supreme Court in *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside*, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984) was once confronted with the same argument presented in *Hall*. The mobile home owners association argued that the ordinance in *Oceanside*, by limiting rent increases, combined with the California Mobilehome Residency Law (Civil Code 798.74), assures that:

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[1] In *Azul* testimony was presented that the market value for ocean view sites was $1200.00 per month. (Tr. Ex. 435, 4:8) Tenants at the Park testified that at the time they purchased their coach, if the rents had been as high as $1,000.00, they would not have purchased at all. (R.T. III, 77:16-78:2, 97:12-18, 106:1-10) Since the majority of mobile home renters are seniors on fixed incomes they have only so much money to spend on housing. Consequently, if potential tenants cannot afford to rent, existing tenants in the Park will be unable to sell at all or at distressingly low prices resulting in a loss in their investment, including its on-site value. This result was exactly what the City sought to avoid with its rent control provision. (Tr. Ex. 292-8).

> "A selling tenant with a favorable rent-controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in a unregulated park of identical quality where higher rents were being charged." 157 Cal.App.3d at 907.

Thus, the landlords argued, a valuable interest of the existing tenant was being sold to a new tenant resulting from the "combined effect" of the state law and the city's ordinance. Yet, the California Supreme court reasoned that where "the ordinance is structured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors", At 907, the ordinance is constitutional. In line with the *Pennell* thinking four years later, the court reasoned that:

> "Rent control attempts to restore free market conditions by limiting rent increases to that level which would occur under general market conditions—a competitive housing market as opposed to a monopolistic or oligopolistic one." 157 Cal.App.3d at 905.

The City's ordinance seeks to do nothing more than this. To do anything less leaves the City's mobile home tenants in a position where they again, are at the mercy of the landlord's pricing policies. To extend *Hall* to the RSO's mobile home rent regulations will deprive tenants of the protection that traditionally rent controls have sought. To this end, the City urges the court to re-examine *Hall*,[2] in light of its application here and in light of the judicial precedent involving price regulation, and reverse *Azul*.

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[2] If after this court examines *Hall* it finds it must overrule *Hall*, the City would invite the court to do so.